FOURTEENTH REPORT

OF THE

Industrial Commission of Colorado

For the Biennium
December 1, 1934,
to
November 30, 1936

Administering:

- Workmen's Compensation Act
- Industrial Relations Act
- State Compensation Insurance Fund
- Factory Inspection Department
- Boiler Inspection Department
- Department of Wage Claims
- Minimum Wage
- Division of Unemployment Compensation
- Colorado State Employment Service, affiliated with United States Employment Service
- Private Employment Agencies

BRADFORD-ROBINSON PRINTING CO.
DENVER, COLORADO
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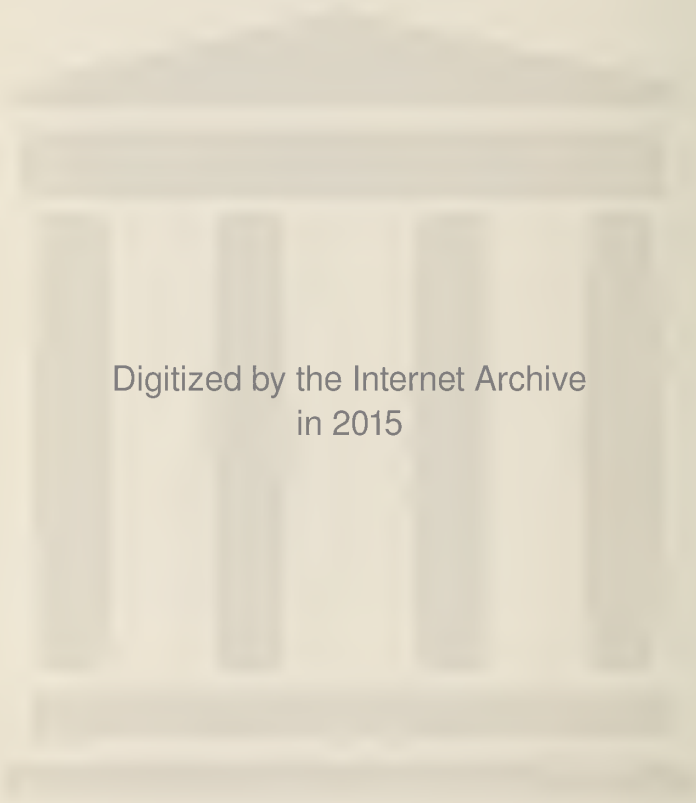


TO HIS EXCELLENCY,
THE GOVERNOR OF COLORADO,
State Capitol Building,
Denver, Colorado.

Sir:

In accordance with the provisions of law creating the Industrial Commission of Colorado, we have the honor to transmit herewith the report of the acts and proceedings of the Commission for the period from December 1, 1934, to November 30, 1936.

W. H. YOUNG,
W. E. RENSHAW,
GEORGE LEWIS,
Commissioners.

INDUSTRIAL HEARINGS

Our records show 223 notices of either changes in hours, wages or working conditions filed with the Industrial Commission during the past two years. Thirty-nine hearings were held and awards issued by the Commission.

Many cases of disputes arising under the Industrial Law were settled during this period that are not included in the figures above, which might have resulted in serious trouble if the Commission had not acted as mediator and brought about amicable settlements. Numerous strikes have taken place throughout the country in the last several years—some of them are in evidence as this report is written. Colorado has been very fortunate in not having had any serious trouble since the I. W. W. strike in 1927. Without the Industrial Commission Law, we feel quite sure our State would also have had trouble.

At this time the state is still paying for labor troubles which have occurred in the past. At the present time there are $491,000.00 worth of Insurrection Refunding Bonds still outstanding, upon which the State is paying 1¾% interest.

The Commission is sure that much trouble and financial loss has been saved both the employers and employes, and also the taxpayers of the state, through the Industrial Commission Law.

WORKMEN'S COMPENSATION ACT

SECTION 21

Again we call attention to the fact that the Commission has always held that Section 21 of the Workmen's Compensation Act was intended to prevent an employer from collecting the cost of workmen's compensation insurance from his employes. We would suggest that this Section be amended to prevent any employer from doing this, and that a penalty be provided for the violation of this Section.

SECTION 47

The people of Colorado at the last election voted for an initiated measure changing the method of finding the wage history. After careful investigation the Commission has found it necessary to increase the premium rates on coal mining fifty per cent, and on metal mining fifteen per cent, to become effective January 4, 1937.

We believe that with the combined efforts of employers and employes in safety work, the rates can be reduced.

SECTION 52

We strongly recommend that paragraph (a) of Section 52 of the Compensation Act be amended to read:

> "(a) Wife **at the time of the accident,** unless it be shown that she was voluntarily separated and living apart from the husband at the time of his injury or death, and was not dependent in whole or in part on him for support."

As Section 52 reads at this time it conflicts with Section 57, which should establish dependency, in our opinion.

SECTION 84

We believe that the statute of limitations should run for one year, instead of six months, and that the act should be amended in this respect. We also believe that such amendment should provide an exception as to the cases where it is found as a fact that the employer had knowledge of the injury and failed to make any report to the Commission. In cases of this kind, we believe the period of limitations should run from the date that knowledge of such accident is brought to the attention of the Commission.

BOND REQUIRED FROM INSURANCE CARRIERS

We believe that a bond of not less than $25,000.00 should be required from every insurance company authorized to write Workmen's Compensation Insurance in Colorado. Employers and employes would be protected if such a bond were required. Employers are now paying compensation to their former employes through the failure of insurance companies with which they carried insurance covering their workmen's compensation liability.

SUBSEQUENT INJURY FUND

Again we recommend that something be done for the employe who loses an arm, leg, foot or eye. Many employers will not employ such unfortunates, due to the fact that should they lose the other arm, leg, foot or eye, or any one in connection with the loss previously sustained, they will become permanent totals and draw compensation as long as they live. They only draw compensation for a specified number of weeks in addition to their hospital and medical for the injuries set forth above.

Again we say that we believe each industry should take care of its own people in such cases. Such crippled employes should not become public charges. Other states are providing subsequent injury funds and we suggest that a law be passed to protect employes under such conditions.

RECOMMENDATIONS

The report of the Department of Factory Inspection shows the need of another inspeetor in order to more fully comply with the Faetory Inspection law. It is therefore strongly urged that another inspeetor be authorized and suffieient money appropriated for that purpose.

Elevators—Outside the City of Denver there is no offieial inspeetion of elevators in Colorado. It is reeommended that this phase of Faetory Inspeetion be given eonsideration, to the end that the workers and the publie generally be more adequately proteeted from injury.

RECOMMENDATION FOR AMENDMENT TO WAGE CLAIM LAW

Under the present laws of Colorado it is an impossibility for the worker who has only a small or medium wage claim to secure the legal action necessary to collect his wages, and there are no laws empowering any board or agency of the state to take any effective measures to assist him in the collection of his claim.

The practice of certain individuals and firms of delaying payment of wages, or evading payment entirely is detrimental to fair business practices, it is demoralizing to the worker and his family, and it places an unfair and unnecessary burden on every community in the State.

Other states have provided remedial legislation which has proved successful and practical in operation.

In order to establish elementary fair business standards and to assure the worker the collection of the wages which he has earned, we recommend the passage of a law which will enable the Industrial Commission to fulfill the mission evidently contemplated by the legislature when the Labor Department was transferred to this Commission—prompt, efficient, practical assistance in the collection of wage claims.

UNEMPLOYMENT COMPENSATION FUND

The legislature in extraordinary session passed the Unemployment Compensation Act and placed the administration of that law under the Industrial Commission of Colorado. At the present writing the Commission is in the process of setting up the neeessary machinery for the accomplishment of that purpose. No doubt in the years to come the need for amendment of the law will be developed by experience. Already the need for one such amendment has developed.

The State of Colorado will have a very large road building program during the next four or five years. The contracts which will be let will be of sufficient size as to warrant numerous contractors from other states coming to Colorado and bidding on these jobs. In case they should be the successful bidders it would be possible for such foreign corporations to complete such jobs within a period of something less than twenty weeks. Under the Unemployment Compensation Act an employer who employs eight or more employes in each of twenty separate weeks during any calendar year, is an employer under the Act. It is therefore probable that some of these out-of-state contractors, although they may employ hundreds of men on their particular jobs, would not come under the law as they would finish the job under twenty weeks. This would be manifestly unfair to the local contractors, most of whose jobs are done within the state lines.

Therefore, It is the recommendation of the Commission that Section No. 19 f (1) be amended to read as follows:

Section 19 f (1). Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals (irrespective of whether the same individuals are or were employed in each such day *and irrespective of whether the employment of such eight or more individuals occurred in Colorado or outside of Colorado)*; * * *

INVESTIGATOR'S REPORT

INDUSTRIAL COMMISSION OF COLORADO,
State Office Building,
Denver, Colorado.

Gentlemen:

Agreeable to your request I herewith submit my report as follows on my activities as Investigator of the Industrial Commission of Colorado, from November 30, 1934, to December 1, 1936.

Aside from assisting in the Wage Claim Department, I investigated and reported on 26 cases for lump sum settlements.

There were 63 cases where employers were alleged to have changed hours, wages and working conditions without the necessary 30 days' notice as provided by law. These were all investigated and where a violation occurred, the employer agreed to and did correct the same.

I investigated 59 alleged violators of the Women's Eight-Hour Law, out of which I prosecuted two cases—the remaining 57 were let off with a warning.

I investigated five coal mine operators for failure to comply with their agreement with the workers, and in each case I was able to effect a settlement agreeable to the employes.

I made 11 investigations on complaints that individuals were conducting theatrical employment agencies without first procuring a state license as provided by law. Most of these were found not to be employment agencies within the meaning of the law. All who were violating this law were asked to cease operations or procure a license at once.

I made an investigation to ascertain the proper employer of an employe who was killed in a clay mine. I was asked to obtain this information for the referee of the Commission who was in doubt as to the proper employer. The mine was being operated on a contract basis.

During the past two years I investigated the conditions of beet workers in northern Colorado and assisted in collecting about $2,000.00 in back wages due the workers. In the past year I am led to believe that the conditions are not as bad as heretofore because we have had very few complaints from the workers and fewer wage claims filed.

Respectfully submitted,

J. R. RUBERSON, Investigator.

FACTORY INSPECTION

All of the duties of the Chief Factory Inspector were transferred to the Industrial Commission by the Code Bill in July, 1933.

From the very beginning, upon assuming these duties, the Commission has been handicapped by want of inspectors and by insufficient appropriation for travel expense and incidental expenses.

Although this report shows highly satisfactory results following the two years' work of only two inspectors in the field, it is nevertheless apparent that the showing falls far below what the people of the State have the right to expect from an inspection department designed to protect the workers from injury by moving machinery, and also designed to protect the public from unseen, unknown and latent dangers, such as are frequently present in schools, theatres, and places of public assemblage.

The factory inspection law which the Commission is required to administer includes the inspection of all factories, mills, workshops, bakeries, laundries, stores, hotels, boarding or bunkhouses, school houses, theatres, moving picture houses and places of public assemblage, or any kind of establishment where laborers are employed or machinery used.

It being obvious from the start that it was impossible to undertake the thorough inspection of all the places named in the law, the Commission elected to choose for its activities those which in its opinion were most necessary, the inspection of which would be of most general public benefit.

But even with the scope of activities reduced to a minimum, it was not possible to make a state-wide or complete coverage because there are not enough inspectors.

Our inspection of school buildings is an apt illustration. Buildings which house the children should by all manner of means be safe, clean, and well provided with accessible exits. But many of tht school buildings inspected throughout the State are far from safe, far from clean, out of repair and far below a reasonable standard of safety.

About one-quarter of the school buildings in the State have been inspected and it is safe to assume that the proportion of buildings not visited which harbor unsatisfactory and perhaps unsafe conditions is the same as applied to those now on our lists.

It must be stated here that no inspection of any kind has been or could be made in 19 of the 63 counties in the State, showing that almost one-third of the territory has not been covered.

In one of the mountain counties that has not been reached a bunk house burned to the ground. Six lives were lost. Investigation showed that the fire was caused by an overheated stove, and the lives were lost because there was only one exit to the building. This accident might have been averted.

Other cases of disaster could be cited to show the necessity of increased force of inspectors in order to carry out fully the plain intent of the law, which is "to protect employes or guests against damages arising from imperfect or dangerous machinery, or hazardous and unhealthy occupations and regulating sanitary conditions."

The activities of the inspectors are shown by the following table, showing the number of inspections made in each month for the entire period of 24 months. An average of 355 inspections per month is shown.

	Number of Inspections	Safety Orders	Sanitary Orders
December, 1934	370	30	.....
January, 1935	330	27	10
February	317	48	15
March	457	42	12
April	476	52	10
May	537	49	13
June	481	54	27
July	167	20	5
August	54	4	.....
September	160	34	15
October	210	43	21
November	306	30	15
December	266	18	15
January, 1936	394	27	26
February	380	35	20
March	390	25	15
April	400	31	15
May	439	62	26
June	390	34	20
July	519	133	15
August	177	59	19
September	360	98	30
October	531	157	17
November	518	94	46
	8,529	1,206	407

ELECTRICAL INSPECTIONS

Under the provisions of House Bill No. 251, adopted four years ago, we are empowered to make and enforce minimum standards with respect to the installation of electric wiring and electric apparatus in cities and towns in Colorado.

No money appropriation was made to pay the necessary expenses of the Electrical Department thus created and no provision was made for the appointment of electrical inspectors.

Notwithstanding this situation, the Commission promptly adopted as its own the rules and standards of the National Electrical Code.

Thereupon the State Factory Inspectors under the Commission were instructed, upon visiting the cities and towns on official business, to inquire of the authorities whether or not safety standards regarding electrical installations were observed.

In many cities salaried inspectors are appointed, but in the vast majority of the towns no such official is named, and the work is generally supervised by some competent person who approves the sufficiency of the work.

Following is a list of the cities and towns visited by the Factory Inspectors during the past biennium. Reports are on file:

Aguilar
Akron
Alamosa
Arvada
Ault
Aurora
Berthoud
Boulder
Brighton
Brush
Buena Vista
Burlington
Canon City
Castle Rock
Cheyenne Wells
Cortez
Crook
Delta
Durango
Eads
Eaton
Englewood
Evergreen
Flagler
Fleming
Florence
Fowler
Ft. Collins
Ft. Lyon
Ft. Morgan
Glenwood Springs
Grand Junction
Golden
Greeley
Haxtun
Holyoke
Hugo
Johnstown
Julesburg
Lafayette
La Junta
Lamar
Las Animas
Louisville
Limon
Littleton
Longmont
Loveland
Monte Vista
Montrose
Ordway
Ouray
Pagosa Springs
Rifle
Rocky Ford
Salida
Sedgwick
Silverton
Sterling
Stratton
Trinidad
Walsenburg
Wray
Yuma

REPORT OF STATE BOILER INSPECTION DEPARTMENT

December 1, 1934, to November 30, 1936

RECEIPTS

December, 1934	$ 550.00	December, 1935	$ 458.13
January, 1935	578.31	January, 1936	627.50
February, 1935	767.13	February, 1936	677.82
March, 1935	996.21	March, 1936	798.23
April, 1935	977.72	April, 1936	990.00
May, 1935	742.02	May, 1936	973.85
June, 1935	843.35	June, 1936	987.74
July, 1935	1,274.93	July, 1936	1,532.55
August, 1935	472.61	August, 1936	367.50
September, 1935	1,262.86	September, 1936	960.35
October, 1935	1,000.43	October, 1936	1,202.50
November, 1935	811.41	November, 1936	455.00

TOTAL	$20,279.15
3,087 boilers @ $5.00 each	$15,435.00
1,924 boilers @ $2.50 each	4,810.00
Interest, etc.	34.15
	$20,279.15
Inspections made—fees not yet collected:	
274 inspections @ $5.00	$ 1,370.00
146 inspections @ $2.50	365.00
	$ 1,735.00
Registered school and county warrants held	$42.50

DISBURSEMENTS

Incidental	$ 532.04
Traveling	4,281.77
Salaries	11,400.00
Special expense—new car	400.00
Salary and expenses for J. J. Kelly for period January 22, 1936, to February 21, 1936	205.81
	$16,819.62
Total receipts	$20,279.15
Total disbursements	16,819.62
Actual profit to date	$ 3,459.53
Fees not yet collected	1,735.00
Warrants held	42.50
Total profit, over and above all expenses, including fees not yet collected and warrants held	$ 5,237.03

Inspections as made from December 1, 1934, to November 30, 1936:

	Wm. M. Crowley	Chas. E. Hall
December, 1934	56	93
January, 1935	63	123
February, 1935	138	126
March, 1935	107	103
April, 1935	101	163
May, 1935	119	126
June, 1935	130	121
July, 1935	132	144
August, 1935	158	107
September, 1935	165	119
October, 1935	22	30
November, 1935	58	63
December, 1935	77	43
January, 1936	58	118
February, 1936	110	106
March, 1936	126	112
April, 1936	136	145
May, 1936	128	130
June, 1936	121	126
July, 1936	93	136
August, 1936	198	113
September, 1936	160	127
October, 1936	25	32
November, 1936	50	67
	2,531	2,573

Total Inspections.....5,104

(The above figures represent total number of inspections made, including those on which fees have not yet been collected, also free inspections.)

Following are inspections made of boilers at State Institutions which are on the books as "Free Inspections":

December, 1934	4
January, 1935	1
April, 1935	22
May, 1935	7
June, 1935	5
July, 1935	10
August, 1935	4
September, 1935	10

October, 1935	4
November, 1935	2
December, 1935	2
January, 1936	1
March, 1936	19
April, 1936	12
May, 1936	7
June, 1936	5
July, 1936	6
September, 1936	14
October, 1936	2
November, 1936	6
Free Inspections	143

The following figures are total receipts and disbursements during the seventeen-month period from February 1, 1932, to June 30, 1933, immediately prior to the date the department was put under the direction of the Industrial Commission

DISBURSEMENTS

Incidental	$ 342.82
Traveling	3,207.75
Salaries	10,759.44
Total Disbursements	$13,310.01

RECEIPTS

Total Receipts	$10,322.53
Deficit	$ 2,987.48

The following figures show the total receipts and disbursements during the seventeen-month period from July 1, 1933, to November 30, 1934, immediately following the date the department was put under the direction of the Industrial Commission:

RECEIPTS

Total receipts	$13,707.65
Fees not yet collected	3,310.00
Warrants held	200.00
Total Receipts	$17,217.65

DISBURSEMENTS

Incidental	$ 546.14	
Traveling	2,696.23	
Salaries	8,032.50	$11,274.87
Total profit over and above expenses		$ 5,942.78

Since the Boiler Inspection Department was put under the jurisdiction of the Industrial Commission it has shown a profit over all operating expenses each year:

Total profit over expenses for the period July 1, 1933, to November 30, 1934	$ 5,942.78
Total profit over expenses for the period December 1, 1934, to November 30, 1936	5,237.03
Total profit over expenses from July 1, 1933 (date Boiler Inspection Department was put under direction of Commission), to November 30, 1936	$11,179.81

MINIMUM WAGE

The Colorado Legislature has enacted three Minimum Wage Laws—the first, in 1913, created a Wage Board for the biennial period for the purpose of conducting investigations of wages paid women and minors, in order to determine if a permanent minimum wage law would be advisable.

Acting upon the recommendations and findings of this Wage Board, the State Legislature of 1915 passed a Minimum Wage Act. This act was vetoed by Governor Carlson, who stated that he believed that the Industrial Commission Law covered all the necessary provisions of the Minimum Wage Act. This, however, was soon found not to be true. Therefore, the 1917 Legislature enacted the present Minimum Wage Law, but made no appropriation for its operation.

Several attempts were made by the Industrial Commission to have various legislatures appropriate adequate funds to render the law effective. One effort promised success, but the United States Supreme Court decision in the Adkins case was handed down, on the eve of a hearing before the Appropriations Committee. In view of the opinion of the Court, and not knowing how far-reaching it would be, it was decided to simply keep the Law on the Statutes, but to make no attempt to enforce it, except for the purpose of investigations, until conditions were more favorable for success.

The Industrial Commission has conducted investigations of the wages paid women, and in 1930 fixed a wage of $17.20 per week as a minimum. This, however, was never enforced.

Section one of the Colorado Minimum Wage Law reads: "The welfare of the State of Colorado demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals, and it is therefore hereby declared, in the exercise of the police and sovereign power of the State of Colorado, that inadequate wages and unsanitary conditions of labor exert such a pernicious effect."

This is identical with the Washington State Law, and, inasmuch, as the United States Supreme Court has agreed to hear a minimum wage case appealed from the State of Washington it seems inadvisable to attempt any enforcement of our law until a decision has been handed down in this case.

However, we believe that our present law could be amended by the incoming legislature, emphasizing the fact that the State has the police power to enact legislation which would provide for wages adequate to maintain women and minors in health and to protect their morals, and that a new case might be brought avoiding all controversial questions involved in both the Adkins and Tipaldo decisions, but using the police power of the State of Colorado as a basis for action.

DEPARTMENT OF WAGE CLAIMS

The activities of the Wage Claim Department have increased considerably during the past two years. A total of $59,167.44 has changed hands as a result of our intervention in disputes between employers and employes concerning wages. This sum is purchasing power in the proper place. A total of 1,649 wage claims were filed during this period and the rate of collections has risen from 45% to 70%. In addition, we have attended to 614 inquiries listed as suspense claims.

Most cases are settled by composing differences in fairness and friendliness. Many letters in our files attest the gratitude of employes and the satisfaction of employers for our efforts in adjusting disputes without malice. Almost every resident of Colorado is an employer or employe at some time and as such may need the services of the only impartial body that can settle wage controversies without expense.

Colorado is high among the enlightened states in labor legislation. However, thousands of dollars of wages are earned each year and remain unpaid for the reason that some individuals continue to take advantage of the ineffectiveness of our wage claim laws. For instance, over $100,000.00 has been claimed as wages in metalliferous mines during the past year, of which less than $2,000.00 has been recorded as paid. This is an unhealthy condition. All cases filed are not good claims, as an investigation soon reveals, but there is nothing to prevent an employer from hiring any number of workers, paying them 1% of the amount earned in money, and the balance in promises, unless it can be proved that he intended to swindle.

For the protection of the great majority of employers who consider it a moral duty to meet a pay roll, doing so must be made a legal obligation. It is obviously unfair to require employers with a sense of social responsibility to compete with unscrupulous persons who are permitted to escape the payment of wages.

The practice of the theft of labor causes utmost bitterness in the worker who has labored for the purpose of earning money to buy necessities. It merely adds to his exasperation when told his remedy is to start suit to collect the small but vital sum he has already earned. But if an employer is intent on cheating a worker, no other course is open within the law.

Seven states have enacted laws designed to curb the wage robbery racket, and at the same time avoid cluttering the courts with small claims. Other legislatures are considering similar provisions. One feature of these laws enables the Industrial Commission to accept an assignment of the worker's claim and sue when necessary.

RESUME

WORK DONE FROM DECEMBER 1, 1934, TO DECEMBER 1, 1936

1934	Claims Filed	Claims Settled	Suspense Claims	Amounts Collected	Settlement Percentages
Dec.	53	36	20	$ 1,513.16	67
1935					
January	72	41	13	2,344.07	56
February	56	30	20	1,789.77	53
March	63	40	57	2,652.35	63
April	80	53	46	2,972.57	66
May	88	52	33	2,183.67	59
June	66	49	23	1,420.91	74
July	90	69	23	3,079.41	76
August	82	47	27	1,680.70	57
September	56	54	25	3,126.06	96
October	92	60	30	4,343.25	65
November	80	47	16	1,415.35	58
December	69	34	22	1,169.80	49
1936					
January	64	50	4	1,371.03	78
February	45	25	10	661.46	55
March	52	41	15	1,446.06	78
April	42	39	21	1,345.08	92
May	50	44	20	1,974.52	88
June	78	65	32	9,267.20	83
July	87	70	31	4,437.30	80
August	74	57	42	2,210.94	77
September	75	51	41	1,720.61	68
October	78	63	21	3,154.83	80
November	57	44	22	1,887.34	77
Totals	1,649	1,166	614	$59,167.44	70

WAGES

WEEKLY EARNINGS IN COLORADO

To show the average weekly earnings of wage earners in various occupations in Colorado the following figures are printed. They cover reports from building construction, manufacturing, public utilities, hotel, wholesale trade, retail trade, bituminous coal mining, quarrying and non-metallic mining, metalliferous mining, laundry, dyeing and cleaning, banking, brokerage, insurance and real estate groups. The public utilities group includes telephone and telegraph, power and light and electric railroad operation.

These figures are taken from reports made to the U. S. Department of Labor for a period ending August, 1936. They show the number of reporting firms in each group, the number of employes engaged, the total amount of wages paid the employes during the week, and the average weekly earnings of each employe in the group. The average earnings of such employes in the United States as a whole is also shown.

BUILDING CONSTRUCTION

Number of firms reporting	227
Number of employes	651
Total pay roll, one week	$ 15,190.00
Average weekly pay per person	23.35

U. S. Average, per person, $23.25.

MANUFACTURING

Number of firms reporting	189
Number of employes	15,785
Total pay roll, one week	$331,847.65
Average weekly pay per person	22.29

U. S. Average per person, $21.33.

PUBLIC UTILITIES

Number of firms reporting	202
Number of employees	5,922
Total pay roll, one week	$162,855.00
Average weekly pay per person	27.50

U. S. Average per person, $29.40.

HOTEL

Number of firms reporting	58
Number of employes	1,295
Total pay roll, one week	$ 15,540.00
Average weekly pay per person	12.00

U. S. Average per person, $13.75.

WHOLESALE TRADE

Number of firms reporting	120
Number of employes	3,043
Total pay roll, one week	$ 83,683.40
Average weekly pay per person	27.50

U. S. Average per person, $28.65.

RETAIL TRADE

Number of firms reporting	448
Number of employes	7,096
Total pay roll, one week	$136,327.00
Average weekly pay per person	24.00

U. S. Average per person, $22.00.

BITUMINOUS COAL MINING

Number of firms reporting	48
Number of employes	2,885
Total pay roll one week	$ 58,132.75
Average pay per person	20.15

U. S. Average per person, $21.50.

QUARRYING AND NON-METALLIC MINING

Number of firms reporting	5
Number of employes	28
Total pay roll one week	$ 546.00
Average pay per person	19.50

U. S. Average per person, $21.67.

METALLIFEROUS MINING

Number of firms reporting	14
Number of employes	1,110
Total pay roll one week	$ 32,026.00
Average pay per person	28.60

U. S. Average per person, $22.36.

LAUNDRY

Number of firms reporting	36
Number of employes	1,559
Total pay roll one week	$ 22,409.00
Average pay per person	14.38

U. S. Average per person, $16.05.

DYEING AND CLEANING

Number of firms reporting	19
Number of employes	281
Total pay roll one week	$ 5,268.75
Average pay per person	18.75

U. S. Average per person, $18.45.

BANKING, BROKERAGE, INSURANCE AND REAL ESTATE

Number of firms reporting	52
Number of employes	1,649
Total pay roll, one week	$ 51,086.00
Average pay per person	31.00

U. S. Average per person, $30.00.

RECAPITULATION

	Colorado Weekly Average	U. S. Weekly Average
Building construction	$23.35	$23.25
Manufacturing	22.29	21.33
Public Utility	27.50	29.40
Hotel	12.00	13.75
Wholesale trade	27.50	28.65
Retail trade	24.00	22.00
Bituminous coal mining	20.15	21.50
Quarrying and non-metallic mining	19.50	21.67
Metalliferous mining	28.60	22.36
Laundry	14.38	16.05
Dyeing and cleaning	18.75	18.45
Banking, brokerage and insurance	31.00	30.00

MISCELLANEOUS OCCUPATIONS

Following figures are from reports sent to the Commission by Private Employment Agencies covering wages offered for the kinds of work mentioned:

Farm and dairy hands $25.00 to $35.00 per month with board.
Cooks on farms and in camps, $1.00 a day and board.
Married men on farms, $25.00 to $45.00 a month.
Man and wife cooks, $60.00 to $80.00 a month and board.
Railroad extra gang, 25c an hour; board 90c a day.
Sheep herders, $20.00 to $30.00 a month and board.
Tie cutters, piece work, 5c each.
Timber cutters, $1.25 a day and board.
Truck drivers, $4.00 a day.
Bean harvesters, $1.50 a day.
Cucumber threshers, 25c an hour.
Hotel work: Chefs, $150.00 a month; Fry cooks, $80.00 a month; women cooks, $15.00 a month; pantry men, $75.00 a month; pantry women, $12.00 a month; dishwashers, $30.00 a month; porters, $40.00 a month; housemen, $40.00 a month; chambermaids, $14.00 a week; housegirls, $6.00 a week; waitresses, $12.00 a week. All the foregoing include board.

A survey was conducted among 6,591 persons in Denver as a project of the National Youth Administration in co-operation with the University of Denver Bureau of Business during the summer of 1936, from which the following summary is obtained:

The average weekly wage of Denver young men and women between the ages of 16 and 25 years, employed full time in gainful occupations is $14.02. More than 80 per cent were found to be drawing salaries of less than $20.00 a week, of which number over two-thirds are within the brackets of $10.00 and $15.00. The survey further discloses that less than two per cent of the 6,591 persons were holding jobs paying $35.00 a week.

FARM WAGES IN THE MOUNTAIN STATES

The following table of rates of wages paid on farms in the eight Mountain States is adapted from reports sent to the United States Department of Labor, covering the summer of 1936. These rates are assumed to be the going rate of wages in each State.

	Per Month		Per Day	
	With Board	Without Board	With Board	Without Board
Montana	$34.00	$48.75	$ 1.00	$ 2.50
Idaho	35.00	50.50	1.60	2.15
Wyoming	32.00	45.50	1.45	2.10
Colorado	24.75	39.00	1.25	1.80
New Mexico	23.25	34.25	1.15	1.50
Arizona	29.00	45.50	1.45	1.75
Utah	36.25	49.75	1.75	2.20
Nevada	35.25	51.00	1.45	2.45

WORK IN BEET FIELDS

	1922 Per Acre	1924 Per Acre	1932 Per Acre	1934 Per Acre	1936 Per Acre
Bunching and Thinning	$ 7.50	$ 9.50	$ 6.00	$ 5.50	$ 7.50
	1.50	2.00	2.00	1.50	1.75
	1.00	1.50	1.00	1.00	1.25
	8.00	10.00	6.00	7.50	9.75
	$18.00	$23.00	$15.00	$15.50	$20.25

The 1936 price paid for labor in the beet fields is based on a contract between the grower and the worker, known as the contractor. The total for all the operations is considerably higher than the price paid for the same class of work in 1934. In that year no contracts were made and the figures printed are minimum amounts, as in many cases a total of $18.00 was realized during that year. Also, in many cases crops were cultivated on the basis of a total amount for all the work, payable at the end of the season instead of immediately on completion of the separate divisions of the work. These also realized an amount in excess of the figures given above for that year.

The variation of prices paid the worker from year to year is shown by the following figures:

	Total		Total
1920	$30.00	1928	$23.00
1921	22.00	1929	23.00
1922	18.00	1930	23.00
1923	19.50	1931	20.00
1924	23.00	1932	15.00
1925	23.00	1933	15.00
1926	24.00	1934	15.50
1927	24.00	1936	20.25

The acreage cultivated has varied a great deal, although the sugar companies aim to have enough acreage under contract to produce sufficient beets to maintain a campaign of grinding lasting about 90 days. This is seldom realized, some campaigns lasting no longer than 60 days. However, the estimated acreage in beets for the whole state is approximately 200,000 annually.

None of the unsatisfactory conditions surrounding the share-cropper, as the system is known in many of the southern states, are present in the beet growing industry, although the worker, or "cropper" must necessarily go on credit for family sustenance during the season. In other words, the contractor is never so completely under the dominance of the source of sustenance and maintenance as to lose all his season's work. In beet field work the worker is paid in money and never has to depend on the returns from the sale of the crop which he produces by his labor. Nor does the worker have to supply the machinery and tools—this is all furnished by the grower.

Each beet work contract for 1936 contains a list of the names and ages of all the children between the ages of 14 and 16 years who may be used on the particular tract, and also contains the stipulation that none of these shall be employed longer than eight hours in any one day.

WAGES ON PUBLIC WORKS

In accordance with the provisions of law, the Industrial Commission of Colorado adopted the following schedule of wages to be paid by contractors on public works on undertakings in excess of $5,000.00:

(The rates are not to apply to the regular employes of the State Highway Department.)

The schedule for all contracts to which the State of Colorado is a party, outside of the cities of Denver, Colorado Springs and

Pueblo, and outside of a radius of fifteen miles of these cities, shall be as follows:

Common labor	$0.60 per hour
Semi-skilled labor	.75 per hour
Skilled labor	1.10 per hour

The schedule for all contracts to which the State of Colorado is a party in the cities of Denver, Colorado Springs and Pueblo, and within a radius of 15 miles of said cities shall be:

Common labor	$0.62½ per hour
Semi-skilled labor	.80 per hour
Skilled labor	1.25 per hour

Provided that the radius of 15 miles outside of the city limits of Denver, Colorado Springs and Pueblo shall not apply to work on public highways, but that the wage scale established by this Commission for highway work shall prevail.

Skilled Labor shall consist of the following: Carpenters, bricklayers and terrazzo workers, iron workers (structural, ornamental and rod workers), steam fitters, roofers (slate, tile and composition), sheet metal workers, plumbers, plasterers, painters, paperhangers and decorators, tile and marble setters, lathers, electrical workers, glaziers, engineers—hoisting and shovel, elevator constructors, cement finishers, asbestos workers, stone masons.

Semi-Skilled Labor shall consist of the following: Drainlayers, hod carriers (serving plasterers, bricklayers and masons), truck drivers of trucks larger than 1½ tons rated capacity, and machine operators (not classified as engineers), tile, marble and terrazzo helpers, assistants to mechanics (not classified as apprentices and assistants learning trades).

All the above schedules are based on a 30-hour week.

WAGES ON HIGHWAYS

The following classification of labor and wage scales are established by the Commission as the classification of labor and wage scale to be used in highway construction in Colorado, effective on all contracts advertised after October 1, 1936:

Executive or administrative employes shall include the contractor, superintendents, timekeepers, bookkeepers, clerical employes, storekeepers, or other office employes in a position of special trust and responsibility.

Supervisory employes shall include foremen, or any employes whose principal duties are to direct the work of others.

The classification of the important labor positions is as follows:

Skilled Labor: Air compressor operator of 750 feet or over; asphalt plant engineer; bricklayer, journeyman; blacksmith,

journeyman; carpenter, journeyman; cement finisher, journeyman; concrete mixer with loader operator; crane operator; crusher operator; drag-line operator; dredge runner; drill dresser; electrician, journeyman; elevating grader operator; finishing machine operator (concrete or asphalt); hoisting engineer; iron workers, journeymen, structural, ornamental and rod workers; mechanic (journeyman machinist or boilermaker); painter, journeyman; paver operator (27 cu. ft. capacity or greater); pile driver engineer—carpenter, iron workers; plumber—pipefitter, gasfitter and steamfitter, journeyman; powder man; power shovel operator, engineer and craneman; rigger; roller operator; stonemason, journeyman; tractor operator.

Intermediate Grade: Air compressor operator, less than 750 ft., asphalt plant drier or head fireman, asphalt raker, baker, blade grader operator, blacksmith's helper and apprentice, carpenter's apprentice, cement finisher's apprentice, churn drill operator, cook, distributor driver, distributor operator, drag tender, electrician's apprentice, fireman and oiler, gas fitter's apprentice, grader operator, iron worker's apprentice, jack hammer operator, jetting machine operator, mechanic helper (machinist or boilermaker), painter's apprentice, paver operator (under 27 cu. ft. rated capacity), plow holder (4-up or more), pipefitter's apprentice, plumber's apprentice, quartermaster, pump man, screening and/or washing plant operator, spreader box man (asphalt, stone or gravel), steamfitter's apprentice, stone mason's assistant (mortar man), teamster (4-up or more), tree pruner, truck driver.

Unskilled Labor: Common and unskilled labor.

The minimum wage paid to all skilled labor employed on this contract shall be one dollar and ten cents ($1.10) per hour.

The minimum wage paid to all intermediate labor employed on this contract shall be seventy cents ($.70) per hour.

The minimum wage paid to all unskilled labor employed on this contract shall be fifty-five cents ($.55) per hour in Denver and radius of fifty miles, remainder of state fifty cents ($.50) per hour.

The minimum wages to be paid to camp help may be on a weekly or monthly basis and shall be not less than would be earned by other labor of similar classification working the full number of hours permitted under these provisions.

The wages of all labor shall be paid in legal tender of the United States, except that this condition will be considered satisfied if payment is made by a negotiable check, on a solvent bank, which may be readily cashed by the employe in the local community for the full amount, without discount or collection charges of any kind. Where checks are used for payment, the contractor shall make all necessary arrangements for them to be cashed and shall give information regarding such arrangements.

All apprentice labor used in connection with this contract shall be in accordance with the established policy for apprentice regulation promulgated and in effect by the State Commission on

Apprentice Training, in conformity with rules and regulations by the Federal Government and while apprentices are classed generally in the intermediate grade or semi-skilled, this would only apply where apprentices had two years experience. Rates of wages for apprentices are already worked out and are well established as is the percentage of apprentices to journeymen to be employed on the job. Regulation of numbers of apprentices, rates of pay and hours of employment are the subject of contract and understanding between employers and employes in the skilled trades and are recognized as such by the Colorado Commission on Apprentice Training.

WAGE SCALE—DENVER BUILDING TRADES

	Per Hour
Asbestos Workers	$1.25
Bricklayers, Masons	1.25
Carpenters	1.25
Cement Finishers	1.25
Composition Floor Finishers	1.25
Electrical Workers	1.25
Elevator Constructors	1.22½
Gasfitters	1.30
Glaziers	1.00
Hoisting Engineers	1.25
Iron Workers, ornamental	1.25
Iron Workers, structural	1.25
Laborers, common	.62½
Laborers, hod carriers	.90
Laborers, plasterers	.90
Lathers, wood	1.25
Lathers, metal	1.25
Machinery Movers, riggers	1.25
Marble Setters	1.25
Mosaic-Terrazzo Setters	1.25
Painters	1.25
Piledrivers	1.25
Plasterers	1.25
Plumbers	1.30
Roofers, composition	1.25
Roofers, slate, tile, etc.	1.25
Sheet Metal Workers	1.25
Sprinkler Fitters	1.30
Steamfitters	1.30
Stonecutters	1.25
Tile Setters	1.25
Tinners	1.25

UNION WAGE SCALES—DENVER

	Hours	Per Week	Per Day	Per Hour
Bakers	8	$30.00	$6.00	$0.75
Bakery Drivers	8	30.00	5.00	.62½
Barbers (guarantee)	8	20.00	3.60	.40
Bill Posters	8	.....	6.00	.....
Blacksmiths	8	44.00	8.80	1.10
Blacksmith Helpers	8	32.00	6.40	.80
Boilermakers	8	50.00	10.00	1.25
Bookbinders	8	40.50	8.10	1.10
Brewery Workers	8	30.00	.....	.....
Bricklayers	6	52.50	10.50	1.50
Cement Finishers	8	43.75	8.75	1.25
Chauffeurs and Truck Drivers	8	.....	4.70	.....
Cigarmakers (minimum)	8	10.00	2.00	.25
Cleaners and Dyers—Men	8	27.50	.....	.....
Cleaners and Dyers—Women	8	16.00	.....	.40
Cooks	8	30.00	5.00	.63
Delivery Drivers	8	23.50	.....	.....
Electricians	6	.....	.....	1.40
Electrical Workers	8	32.40	6.48	.81
Elevator Constructors	8	.....	.....	1.22½
Furniture Workers	8	.....	3.50	.44
Garment Workers	8	15.00	3.00	.37½
Glass Workers	8	.....	.....	.75
Hodcarriers	8	33.00	6.60	.62½
Hoisting Engineers	8	50.00	10.00	1.25
Iron Molders	8	33.00	6.60	.82½
Jewelry Workers	8	.....	.....	1.00
Laundry Workers	8	11.25	2.00	.25
Leather Workers	8	30.00	.....	.....
Lithographers	8	50.00	10.00	1.25
Machinists	8	.....	5.60	.80
Meat Cutters	8	34.00	3.50	.54
Milk Wagon Drivers	8	25.00	.....	.....
Painters	7	43.75	8.75	1.25
Painters—Auto	8	30.00	6.00	.75
Patternmakers	8	39.60	7.20	.90
Photo Engravers	7½	50.00	8.34	1.14
Pressmen—Cylinder	8	44.00	8.00	1.00
Pressmen—Job	8	35.15	.....	.90
Retail Clerks	8	25.00	.....	.....

	Hours	Per Week	Per Day	Per Hour
Sign Writers	8	$45.00	$ 9.00	$ 1.25
Stage Employes—Theatre	Wk. 40	54.00	.....	.....
Theatre Assistants	Wk. 40	50.00	.....	.....
Moving Picture Houses	Wk. 40	45.00	.....	.....
Steamfitters	8	45.00	9.10	1.30
Stereotypers	8	44.85	7.47	.....
Stonecutters	8	43.75	8.75	1.25
Tailors	8¼	32.50	6.50	.....
Typographical:				
Newspaper—Day	7.20	.....	8.25	.....
Newspaper—Night	7.20	.....	8.80	.....
Commercial—Day	8	.....	8.10	.....
Commercial—Night	8	.....	8.65	.....
Waiters	8	13.20	2.30	.27½
Welders	6	37.50	7.50	1.25

UNION WAGE SCALE—PUEBLO

Bakers (minimum)	6	39.00	5.63	.77
Barbers	..	.....	65%	.....
Bricklayers	8	55.00	10.00	1.25
Brewery Workers	8	30.00	5.70	.75
Carpenters	7	38.50	7.70	1.10
Electricians	8	.....	.....	1.00
Machinists	8	32.00	6.40	.80
Hodcarriers	8	32.00	6.40	.80
Moving Picture Operators:				
Class A House	8	38.50	.....	.....
Class B House	..	29.75	.....	.....
Lathers	Wk. 40	50.00	10.00	1.25
Musicians	8	25.00	.....	.....
Painters	8	40.00	8.00	1.00
Plasterers	8	50.00	10.00	1.25
Plumbers	8	44.00	8.80	1.10
Sheet Metal Workers	8	49.50	9.00	1.12½
Steam Engineers	8	35.00	7.00	.87½
Street Railway Employes	6	28.00	4.00	.65
Typographical—Day Rate	7	31.50	6.30	.90
Typographical—Night Rate	7	36.00	6.72	.96
Pressmen—Cylinder	6.40	39.50	.....	.....
Pressmen—Job	6.40	33.00	.....	.....
Pressmen—Web	6.40	45.00	.....	.....

INDUSTRIAL COMMISSION OF COLORADO,
State Office Building,
Denver, Colorado.

Gentlemen:

I am submitting herewith biennial report of the Colorado State Employment Service for the calendar years 1935 and 1936.

This report is a summary of the activities of the entire Service and of the various offices of the Colorado State Employment Service, comprising Districts 1 and 2, for the two-year period beginning January 1, 1935, and ending December 31, 1936.

This report is submitted as of December 10, 1936, and consequently shows incomplete records and figures for the month of December, 1936. Where yearly totals were desired for comparison, the figures were projected for December conservatively, as indicated by the activities of the first ten days of the month, past records, and sustaining employer demands.

Sincerely,

O. S. WOOD,
Director.

COLORADO STATE EMPLOYMENT SERVICE

Affiliated with

UNITED STATES EMPLOYMENT SERVICE

401 Kittredge Building
Denver, Colorado
December 12, 1936

THE STATE SERVICE

Thirteen of Colorado's sixty-three counties are now covered by the Colorado State Employment Service. District No. 1, administered through the Denver office, includes nine counties: Denver, Arapahoe, Adams, Clear Creek, Grand, Gilpin, Jefferson, Park and Summit. District No. 2 includes four counties: Pueblo, Fremont, Chaffee, Custer.

As indicated in Chart No. 1, the majority of activities are carried on by the Denver office. The Pueblo office performs the greater service in District No. 2. Other county offices function in proportion as may be expected in considering the county population and the limitations of a single representative in the office.

Chart No. 1 presents a picture of the distribution of activity of the entire service as set up within the limits of state support under the provisions of the Wagner-Peyser Act of 1933.

During the biennial period from January 1, 1935, to December 31, 1936, the Colorado State Employment Service, in its capacity as a department of the State government, was called upon to serve as an emergency placement agency for public works and relief projects. While the service was the logical medium for conducting these mass emergency placements, and the only department of the State government prepared to assume the task, the normal functions of the office were somewhat retarded. Concentrated effort to find jobs in private industry was impossible under the stress of the emergency program.

Since the decline of PWA placements during 1936 and the severing of WPA employment since July 1, 1936, an appreciable gain in private industry placements has been noted.

The contact program, an integral part of the service efforts to match jobs with the jobless, was necessarily impeded during the last four months of 1935 by the exigencies of the federal assignment to place some 15,000 men and women on public works projects.

Similarly, during the last four months of 1936, another federal assignment, the WPA Re-interview Program, impaired the full efficiency of a special contact drive.

Yet, despite all interference with efforts to fill jobs in private industry, the Re-interview Program has already proven its worth. Up-to-date information as to skills, experience, and em-

ployability of its registrants is essential for efficient employment service. Consequently, the re-examination of 9,353 applicants in the Denver files, and 15,241 throughout the State, will be a valuable asset for more effective placement in the fields of private endeavor.

ACTIVITY DISTRIBUTION BY COUNTY OFFICES FOR 1936

Chart No. 1

Offices	Active File (Dec. 10)	*Total Placements
Denver District:		
Denver	31,089	16,711
Arapahoe	1,826	1,038
Clear Creek	245	759
Adams	2,011	575
Grand	90	456
Jefferson	1,809	449
Gilpin	217	221
Park	205	62
Summit	49	19
Pueblo District:		
Pueblo	6,270	3,773
Fremont	1,573	1,182
Chaffee	770	613
Custer	179	108
Total	46,333	*25,966

*December figures excluded. Additional 2,000 estimated for service total: 27,966.

PLACEMENT RECORD

Employment records as summarized in Chart No. 2 and its accompanying graph show a significant gain in private industry jobs found by the service in 1936.

Four thousand three hundred and ninety-three private placements were made in 1935. In 1936 an increase of 87.4% is represented in the total of 8,236 private jobs filled.

Jobs on public works from January to August of 1935 fairly balanced private placements, PWA assignments having maintained an even tenor since 1933.

In October, 1935, the service took over the placement of WPA workers. This, together with an increase of PWA projects, raised the totals of public works and relief placements far out of proportion during the winter months until July, 1936, when the WPA office assumed the task of project assignment.

It is significant that as efforts of the service were concentrated upon mass public placements records in private industry declined.

The remarkable increase of 87.4% in private employment, however, was normally distributed over the twelve months of 1936 and must be attributed to an increasing popular acceptance of the service as a result of contacts and of satisfactory placements.

The distribution of total placements among men, women and veterans, as illustrated in Chart No. 3, brings out two important points. The percentage relation of jobs found for women and men was sustained at about 1-3, except during the months of greatest public works placements.

One out of every seven jobs in private industry went to a war veteran. This Colorado figure betters the national record which shows a veteran placement in every 15 jobs. Two thousand four hundred and eight veterans were placed in 1935. The total of 1,847 veterans placed in 1936 was calculated without the full December figures, which will include several hundred temporary postoffice jobs throughout the State.

A gain of 6,920 total placements in 1936 over 1935 is not the true picture of the growth of the Colorado State Employment Service. The complete placement record is summarized in the figures which show that over half of the 1936 increase was in private employment and that private employment very nearly doubled during twelve months of 1936.

PLACEMENT RECORD BY MONTHS FOR THE BIENNIUM

Chart No. 2

1935				1936		
Public Works and Relief Projects	Private	Total		Public Works and Relief Projects	Private	Total
256	295	551	January	3,327	326	3,653
178	330	508	February	2,330	288	2,618
348	271	619	March	2,500	472	2,972
271	418	689	April	2,022	681	2,703
323	406	729	May	1,235	1,164	2,399
579	465	1,044	June	1,395	700	2,095
481	412	893	July	902	931	1,833
319	380	699	August	775	629	1,404
1,737	484	2,221	September	1,448	750	2,198
2,253	380	2,633	October	1,331	1,025	2,356
4,800	247	5,047	November	1,065	670	1,735
5,108	305	5,413	December	*1,400	*600	*2,000
16,653	4,393	21,046	Total	19,730	8,236	27,966

*December records incomplete.

			GRAND TOTALS 1935 AND 1936
Private employment increase over 1935..87.4%	19,730	8,236	27,966
Public employment increase over 1935....33.0%	16,653	4,393	21,046
	36,383	12,629	49,012

PLACEMENT RECORD SHOWING SEX AND VETERAN STATUS

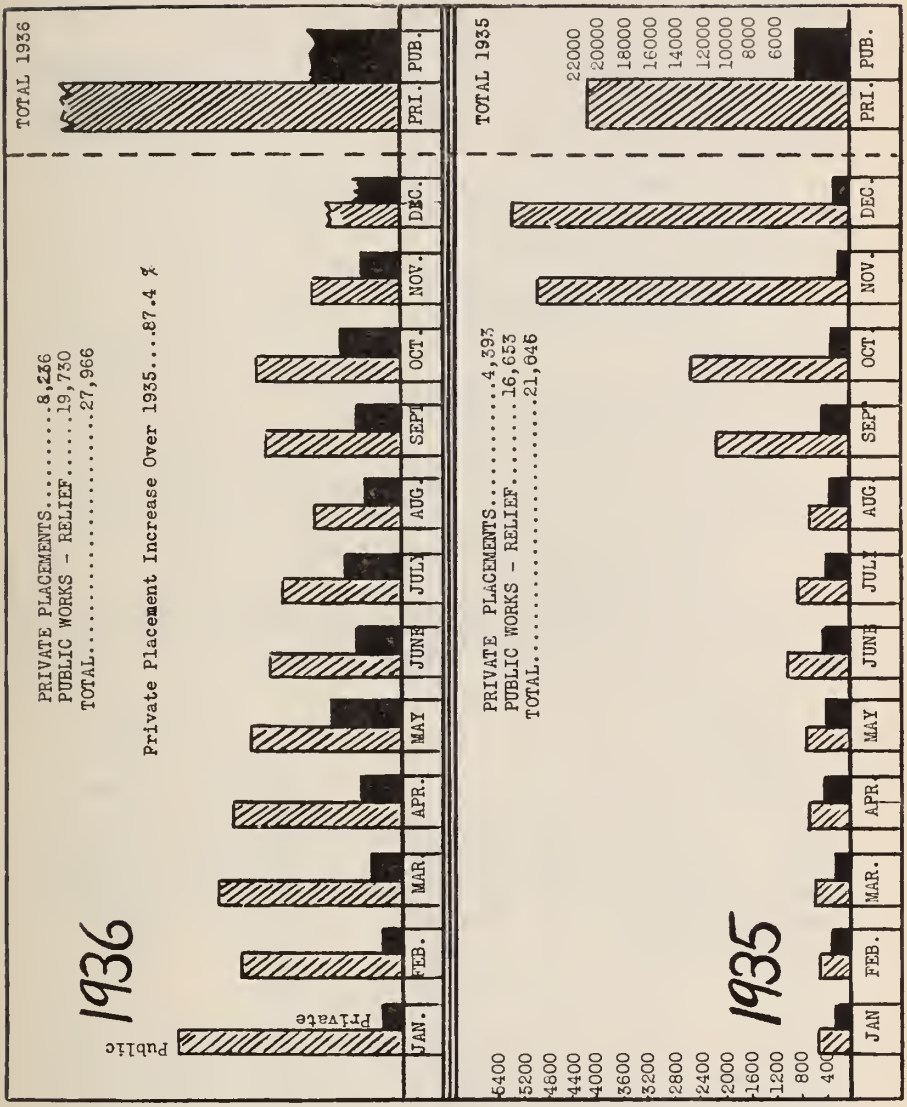
Chart No. 3

1935 Men	1935 Women	1935 Veterans		1936 Men	1936 Women	1936 Veterans
387	164	87	January	2,583	1,070	128
382	126	205	February	1,955	662	167
454	165	193	March	2,233	740	144
453	236	131	April	1,866	837	150
488	241	141	May	1,834	565	122
746	298	202	June	1,678	417	107
620	273	124	July	1,364	469	156
409	290	84	August	1,092	312	71
1,928	293	269	September	1,871	327	233
2,409	224	270	October	2,016	340	178
4,793	254	366	November	1,420	315	191
4,709	704	336	December	*1,700	*300	*200
17,778	3,268	2,408	Total	*21,610	*6,354	*1,847

GRAND TOTAL 1935
21,046

GRAND TOTAL 1936
27,966

*December records incomplete.


1936
Public
Private
PRIVATE PLACEMENTS.....8,266
PUBLIC WORKS - RELIEF.....19,730
TOTAL.....27,966
Private Placement Increase Over 1935....87.4 %
JAN. FEB. MAR. APR. MAY JUNE JULY AUG. SEPT. OCT. NOV. DEC.
TOTAL 1936
PRI. PUB.
1935
PRIVATE PLACEMENTS.....4,393
PUBLIC WORKS - RELIEF.....16,653
TOTAL.....21,046
5400 5200 4800 4400 4000 3600 3200 2800 2400 2000 1600 1200 800 400
22000 20000 18000 16000 14000 12000 10000 8000 6000
JAN FEB. MAR. APR. MAY JUNE JULY AUG SEPT OCT NOV. DEC.
TOTAL 1935
PRI. PUB.

DEPARTMENTAL PLACEMENTS

As illustrated earlier in this report, private placements at present are made largely by the Denver office of the service, with considerable records submitted by the Pueblo branch.

Since records of placements in the four major occupational departments were not available for all county offices, a breakdown of departmental placements by the Denver office is used to illustrate these special activities.

Three thousand five hundred fifty private jobs found by the Denver office in 1935 were distributed as follows:

Commercial and Professional (Including stenographers, accountants, salespeople and office workers)	707
Domestic (Including cooks, maids, beauty operators and home help of every description)	1,698
Hotel and Restaurant (Including cooks, waitresses, maids and clerks)	780
Industrial (Including shop and factory workers, skilled and unskilled labor)	365

In 1936, with incomplete figures for December excluded, 5,487 private jobs were filled by the departments as follows:

Commercial	837
Domestic	1,587
Hotel	1,540
Industrial	1,523

A very decided gain in commercial placements during October, November and December of 1936 is attributed to special efforts made by the newly established Contact Department, which concentrated its drive in this field as a testing laboratory for its own effectiveness.

THE CONTACT PROGRAM

The contact program during 1935 and the early part of 1936 could not be organized for any concentrated or sustained drive to acquaint employers with the purpose and functions of the service. Every well-designed attempt to make a systematic canvass of employment opportunities was thwarted by new demands upon the entire office personnel in the Federal Emergency Program.

Consequently the relation of the contact program to private employment records is not clearly seen except in the general placement increase that must have followed upon field visits.

A very definite relation is seen, however, during the months of October, November and December of 1936, when an organized Contact Department was free in greater degree to campaign among employers. A series of letters were followed by personal calls which showed favorable results in the placement records.

The special efforts resulting in increased jobs in the commercial field have already been pointed out. This is further emphasized in Chart No. 4, which shows an indisputable ratio between personal visits and new jobs.

It must be realized that the effect of a field visit may not be seen immediately. There is not necessarily a direct relation within the month of placements and contacts made within that month. Contact representatives frequently secure orders while in the field, but a favorable contact is primarily designed to make a constant user of the service.

Figures for the last three months of 1936 are therefore doubly indicative of the value of the Contact Department in that definite and immediate results are quite evident.

One thousand one hundred sixty-six contacts in 1935 contributed toward securing 4,393 jobs. In 1936 contacts were doubled and placements were likewise increased nearly 100%.

RELATION OF CONTACT PROGRAM TO PRIVATE EMPLOYMENT

Chart No. 4

1935			1936	
Contacts	Private Placements		Contacts	Private Placements
213	295	January	34	326
163	330	February	134	288
224	271	March	242	472
120	418	April	210	681
203	406	May	250	1,164
35	465	June	197	700
48	412	July	128	931
8	380	August	200	629
30	484	September	68	750
73	380	October	250	1,025
21	247	November	746	670
28	305	December	*700	*600
1,166	4,393	Total	3,174	8,236

*December records incomplete.

FINANCIAL REPORT

The cost of Colorado's State Employment Service is the important consideration in determining the value of the institution in the community. And while dollars and cents is not the only cost to be weighed, it is, nevertheless, a controlling factor in the maintenance and growth of the organization.

The financial report for the years of 1935 and 1936, followed by a determination of the cost per job, gives evidence to justify the existence of a public employment service in this State.

Because of the manner in which the service is financed under the provisions of the Wagner-Peyser Act, it is necessary to chart the costs as they are shared by the State, the federal government and cities or counties.

Fairly accurate figures for 1935 and 1936 and complete totals for the biennial period are reliable for determining the cost per job, which is the true estimate of the service.

COST PER JOB

It cost the State of Colorado exactly forty-eight cents to place each individual in a job through the Colorado State Employment Service in 1935. The cost was forty-five cents in 1936.

If jobs in private employment alone are to be considered, the cost in 1935 was $2.32. In 1936 each private job found cost the State $1.53, or $1.80 per job for the two-year period.

When the help of federal and other funds is taken into consideration, the cost is slightly more than doubled. On the basis of total placements the cost of a job to the State and federal governments was $1.40.

The real advantage of the service, of course, is realized by the thousands who need work and who are able to secure it without cost to themselves or the employer.

PLACEMENT COST REPORT

Chart No. 5

	1935	1936	Total
Total Placements	21,046	27,966	49,012
Total Cost (State, Federal and other)	$22,283.39	$50,003.19	$72,286.58
Cost Per Job	$ 1.05	$ 1.78	$ 1.40
Total Placements	21,046	27,966	49,012
Cost to State	$10,207.42	$12,606.43	$22,813.85
Cost Per Job (State)	$ 0.48	$ 0.45	$ 0.46
Private Placements	4,393	8,236	12,629
Cost to State	$10,207.42	$12,606.43	$22,813.85
Cost Per Private Job	$ 2.32	$ 1.53	$ 1.80

PRIVATE EMPLOYMENT AGENCIES

The duties of the Deputy State Labor Commissioner in connection with State private employment agencies having been transferred by the Code Bill to the Industrial Commission, jurisdiction was accordingly assumed July 1, 1933, and the Commission has proceeded to enforce the provisions of the law since that time.

Notwithstanding the complete absence of any money appropriation for this purpose, the Commission has never allowed this omission to interfere with the prompt and forceful enforcement of the private employment agency law.

There are now 21 private employment agency licenses in force, all but three being located in Denver. In addition to this there are two theatrical employment agencies, also in Denver.

The total amount of money collected during the period covered by this report (December 31, 1934, to December 31, 1936) was $3,650.00.

All of this money was turned in to the state treasury to the credit of the general fund. No appropriation was made for printing, postage, or incidental expenses.

During the two years all complaints filed against private employment agencies were investigated and determined. Most of the claims consisted of requests for refund of fees paid. In every case where the agency was found to be liable the money paid by applicants was refunded. In no case was it necessary to take court action.

The total amount of money returned to applicants by agencies was $37.25, to 14 different persons.

THEATRICAL EMPLOYMENT AGENCIES

In 1935 the State legislature enacted the private theatrical employment agency law, requiring a State license from those engaged in the business of conducting an agency, bureau or office for the purpose of procuring or offering engagements for circus, theatrical or other entertainments or exhibitions or performances.

An annual license fee of $100.00 was fixed, and the administration of the law was placed under the State Industrial Commission.

A bond of $1,000.00 is required to be posted.

Receipts from these agencies during the past two years totaled $300.00, all of which was turned in to the state treasury to the credit of the general fund, except 15% for expenses.

It has been a difficult task to administer the theatrical agency law in a way that would not impose a hardship on persons and undertakings that are affected only by inference. However, the Commission feels that all its acts and decisions under the law have been fair and just. Thus far no court action has been necessary in any case.

REJECTIONS OF THE WORKMEN'S COMPENSATION ACT BY EMPLOYERS

The number of rejections, by years, is shown below:

Year	Rejections
1921	1
1922	2
1923	5
1924	2
1925	12
1926	12
1927	24
1928	27
1929	46
1930	71
1931	92
1932	213
1933	237
1934	140
1935	115
1936	108

STATE COMPENSATION INSURANCE FUND

December 11, 1936.

INDUSTRIAL COMMISSION OF COLORADO,
State Office Building,
Denver, Colorado.

Gentlemen:

The outstanding feature of an analysis of the accompanying report submitted herewith, of the State Compensation Insurance Fund, covering the biennium of 1935 and 1936, is the steady and continuous growth under your administration.

The new business written has very largely come from large industrial employers throughout the State of Colorado and reflects the growing confidence in the stability and financial safety of the fund to afford complete protection and efficient service at a considerable saving to them.

The amount of clerical work involved in the operation of the fund is very forcefully evidenced by the increased premium collections, number of accidents reported, compensation payment vouchers issued, etc., all of which has necessitated additional employes and equipment. The fund has, however, kept the operating expenses well within the statutory limits as allowed for administration under Section 44 of the Workmen's Compensation Act.

The investments of the fund consist of obligations of the federal government, or of bonds issued in accordance with authority conferred by a vote of the electors and in conformity with the Constitution and laws of Colorado. Substantially all of the bond investments represent claim and catastrophe reserves which are set aside to assure the payment of future benefits and awards on continuing and pending claims wherein the injury or accident occurred in 1935, or former years.

STATEMENT OF FINANCIAL CONDITION AS OF DECEMBER 31, 1935

ASSETS

U. S. Government, State of Colorado and General Obligation Bonds of Colorado Municipalities		$3,980,857.68
Registered 6% Warrants of Colorado Counties, Towns and School Districts		16,622.64
Cash on Deposit with State Treasurer		101,958.54
Premiums Less Than 90 Days Past Due and Less 10% of Premiums of Public Employers		169,352.49
Interest Accrued December 31, 1935		41,134.58
Total Assets		$4,309,925.93

LIABILITIES

Reserve to Pay All Claims to Maturity		$2,063,532.61
Premiums Unearned December 31, 1935		348,291.21
Dividends Declared But Unpaid as of December 31, 1935		99,519.66
Reserve for Dividends		300,000.00
Total Liabilities		2,811,343.48
Catastrophe Fund		800,567.05
Surplus		698,015.40
		$4,309,925.93

INCOME

Premiums Written		$1,474,421.46
Interest Received		141,523.93
Miscellaneous		1,358.91
From Sale and Redemption of Bonds		579,650.00
Warrants		13,069.24
Total Income		2,210,023.54
Cash on Hand December 31, 1934	$326,655.80	
Premiums Outstanding December 31, 1934	170,470.05	
		497,125.85
		$2,707,149.39

DISBURSEMENTS

Compensation and Medical Benefits Paid During Year		$ 716,591.18
Dividends Paid Policyholders		174,138.51
Operating Expense		92,075.82
Special Medical Inspection Fees		137.08
Bonds and Warrants Purchased:		
Bonds		1,376,243.17
Warrants		20,184.37
Total Disbursements		2,379,370.13
Cash on Hand December 31, 1935	$101,958.54	
Premiums Outstanding December 31, 1935	225,820.72	
		327,779.26
		$2,707,149.39

INCOME AND DISBURSEMENTS JANUARY 1 TO NOVEMBER 30, 1936

INCOME

Premiums Written		$1,251,490.10
Interest Received:		
Bonds	$137,169.84	
Registered Warrants	336.95	
		137,506.79
From Sale and Redemption of		
Bonds	$78,500.00	
Registered Warrants	6,521.73	
		85,021.73
Cash on Hand December 31, 1935	$101,958.54	
Premiums Outstanding December 31, 1935	225,820.72	
		327,779.26
		$1,801,797.88

DISBURSEMENTS

Compensation and Medical Paid		$ 787,016.58
Dividends to Policyholders		219,324.72
Operating Expenses		95,989.00
Investments:		
Bonds	$154,087.10	
State Warrants	59,372.80	
Registered Warrants	2,029.22	
		215,489.12
Premiums Charged Off		784.71
*Accounts Receivable		1,900.00
Cash on Hand November 30, 1936	$245,583.30	
Premiums Outstanding	235,710.45	
		481,293.75
		$1,801,797.88

*The above item represents an amount advanced to defray the pro rata cost of premium on the bond of the State Treasurer as custodian of the State Compensation Insurance Fund. In 1935 the legislature failed to appropriate any money for this premium. Consequently, since it was imperative that the bond be secured, the Industrial Commission at the direction of the Executive Council and with the approval of the Attorney General advanced the necessary premium with the understanding that the General Assembly would be asked to reimburse the Fund in 1937.

The item, "Registered Warrants," represents warrants of towns, counties and school districts which have been taken in payment of premiums and which are held as investments until sufficient funds are available for their redemption. These warrants draw interest at the rate of 6%. The fund makes no outright purchase of warrants of this kind.

The item of "Cash" represents an amount sufficient to pay all current compensation and medical benefits and expenses. When more than enough cash for current needs accumulates the excess is either invested in interest-bearing securities or returned to policyholders as dividends.

Premiums outstanding less than ninety days are included in this statement. A considerable portion of the amount shown in this item is for premiums not actually due until after December 31, 1935, and carried as "Unearned Premiums."

The item of "Accrued Interest" represents the amount of interest accrued on bonds owned by the State fund up to December 31, 1935, the interest due dates for which fall in 1936.

"Reserve to Pay All Claims to Maturity" represents the amount set aside for open claims to pay them in full. In addition to the reserve on individual cases the figure shown includes a contingent reserve to cover unreported losses as of December 31, 1935; to provide for fluctuations in individual claim reserves, and any additional liability which may be incurred on subsequently reopened claims.

"Dividends Declared But Unpaid" represent the estimated amount of dividends due on earned premiums up to December 31, 1935, to be apportioned to policyholders as soon as the actual earned premium is determined.

Net premiums written by the State fund in 1935 amounted to $1,474,421.46. Premiums written by the fund since its inception to December 31, 1935, amount to $11,638,813.33, while the dividends returned to policyholders in the same period have totaled $1,699,952.62.

During 1935 the State fund actually paid out in compensation and medical benefits $716,591.18 and since it started activities in 1915 it has paid out a total of $6,454,344.28 in compensation and medical benefits to December 31, 1935.

Since the origin of the State Fund and up to July 1, 1924, our rates were 10% cheaper than competitive carriers. From July 1, 1924, to October 31, 1932, our rates were 15% less, and from October 31, 1932, to March 1, 1936, they were 20% under the rates of other carriers. Effective March 1, 1936, a rate differential of 30% on new and renewal business was approved by your Commission.

The State Fund continues to be the outstanding compensation

carrier in Colorado, writing approximately 65% of the combined total of all compensation business written in the State.

The expenses of the State Compensation Insurance Fund are paid out of its income and in no manner is the cost of its operations paid out of State moneys derived from taxation.

Respectfully submitted,

H. C. WORTMAN, Manager.

CLAIM DEPARTMENT

During the past two years every effort has been made to improve the service of this department. In spite of the fact that but two referees are available to handle the compensation hearings, and, in addition, to conduct the routine business of the claim department, hearings have been held in Denver continuously throughout the period and hearings have been had in outlying sections of the State more frequently than in the past. It is the policy of the Commission to hold hearings in the leading industrial centers every sixty to ninety days and in other parts of the State as frequently as possible, but not less than twice or three times a year. Numerous special trips have been made to various parts of the State where it appeared that the delay occasioned by scheduled hearings would work a hardship on any parties.

The following table shows a comparison of the work in the department for the past five biennia:

	1927-28	1929-30	1931-32	1933-34	1935-36
First Reports of Accident	39,344	48,819	39,672	44,083	54,774
Claims for Compensation	11,063	10,617	8,358	8,182	9,782
Lump Sum Applications	324	448	513	505	579
Hearings held	3,590	3,118	3,123	2,952	3,265
Awards issued	4,798	5,194	5,563	5,112	5,195

The number of hearings shown above does not take into account hearings ordered by the Commission by award, cases heard by agreement between the parties, or summarily without notice. Attention is directed to the fact that first reports of accident submitted to the department in 1936 exceed those of previous years by nearly 4,000 and that the routine work of the department is accordingly increased from fifteen to twenty per cent.

WORKMEN'S COMPENSATION INSURANCE

Premium Income and Losses Paid—Colorado

NET PREMIUM INCOME

Year	Stock Companies	Mutual Companies	State Fund	Yearly Totals
*1915	$ 32,602.56	$ 163,526.58	$ 46,710.00	$ 242,839.14
1916	375,402.36	254,351.63	134,371.41	864,125.40
1917	664,049.89	303,466.36	192,328.45	1,159,844.70
1918	854,239.28	382,528.75	370,593.75	1,607,361.78
1919	818,782.86	313,432.55	267,612.12	1,399,827.53
1920	906,639.75	502,262.10	460,116.11	1,869,017.96
1921	931,622.93	416,087.25	364,009.52	1,711,719.70
1922	590,611.51	330,407.73	339,537.41	1,260,556.65
1923	665,509.93	402,663.69	404,562.16	1,472,735.78
1924	806,751.61	398,077.73	412,733.56	1,617,562.90
1925	1,033,794.56	351,428.79	554,868.86	1,940,092.21
1926	1,031,537.78	348,613.55	605,630.54	1,985,781.87
1927	1,001,375.17	357,852.64	880,400.39	2,239,628.20
1928	965,159.08	420,823.09	676,327.54	2,062,309.71
1929	1,092,230.06	434,515.26	720,568.78	2,247,314.10
1930	1,050,513.00	373,002.00	747,652.00	2,171,167.00
1931	877,422.00	302,816.00	697,955.00	1,878,193.00
1932	583,190.00	234,998.00	614,933.00	1,433,122.00
1933	518,321.00	197,971.00	635,432.00	1,351,724.00
1934	698,422.00	222,349.00	1,071,251.00	1,992,022.00
1935	688,411.00	293,835.00	1,474,421.00	2,456,667.00
Totals	$16,286,589.33	$7,005,008.70	$11,672,014.60	$34,963,612.63

NET LOSSES PAID

Year	Stock Companies	Mutual Companies	State Fund	Yearly Totals
*1915	$ 1,738.02	$ 2,637.46	$ 2,563.65	$ 6,939.13
1916	128,719.80	23,188.98	28,535.76	180,444.54
1917	191,556.57	58,546.16	42,497.24	292,599.97
1918	243,915.88	74,008.02	51,391.68	369,315.58
1919	294,156.65	98,135.51	86,546.79	478,838.95
1920	356,059.22	111,893.71	128,333.71	596,286.64
1921	389,800.87	130,440.08	168,340.20	688,581.15
1922	385,124.75	141,611.72	178,710.00	705,446.47
1923	499,806.15	134,095.21	201,169.98	835,071.34
1924	528,407.02	134,713.11	246,969.03	910,089.16
1925	567,364.78	139,083.34	279,972.80	986,420.92
1926	596,449.24	139,019.76	310,296.34	1,045,765.34
1927	596,618.80	149,883.31	372,349.08	1,118,851.19
1928	610,412.52	156,431.50	413,826.79	1,180,670.81
1929	618,767.28	180,333.88	484,386.67	1,283,487.83
1930	646,477.00	183,490.00	510,018.00	1,339,985.00
1931	620,509.00	187,744.00	549,219.00	1,357,472.00
1932	486,772.00	165,921.00	540,915.00	1,193,608.00
1933	437,012.00	151,213.00	542,274.00	1,130,499.00
1934	426,975.00	145,498.00	594,829.00	1,172,302.00
1935	389,273.00	160,772.00	716,591.00	1,266,636.00
Totals	$9,015,915.55	$2,668,659.75	$6,454,735.72	$18,139,311.02

*August 1, 1915, to December 31, 1935.

STATISTICS—ACCIDENTS AND CLAIMS, WORKMEN'S COMPENSATION DEPARTMENT

CLASSIFICATION	1915-1916 Aug. 1, '15 to Nov. 30, '16	1917 Dec. 1, '16 to Nov. 30, '17	1918 Dec. 1, '17 to Nov. 30, '18	1919 Dec. 1, '18 to Nov. 30, '19	1920 Dec. 1, '19 to Nov. 30, '20	1921 Dec. 1, '20 to Nov. 30, '21	1922 Dec. 1, '21 to Nov. 30, '22	1923 Dec. 1, '22 to Nov. 30, '23	1924 Dec. 1, '23 to Nov. 30, '24	1925 Dec. 1, '24 to Nov. 30, '25	1926 Dec. 1, '25 to Nov. 30, '26	1927 Dec. 1, '26 to Nov. 30, '27	1928 Dec. 1, '27 to Nov. 30, '28	1929 Dec. 1, '28 to Nov. 30, '29	1930 Dec. 1, '29 to Nov. 30, '30	1931 Dec. 1, '30 to Nov. 30, '31	1932 Dec. 1, '31 to Nov. 30, '32	1933 Dec. 1, '32 to Nov. 30, '33	1934 Dec. 1, '33 to Nov. 30, '34	1935 Dec. 1, '34 to Nov. 30, '35	1936 Dec. 1, '35 to Nov. 30, '36	From Organization Aug. 1, '15 to Nov. 30, '36	CLASSIFICATION
1. Number of Accidents	16,670	12,780	14,932	11,358	14,279	13,004	12,869	15,862	17,518	18,143	19,797	19,671	19,773	26,846	22,973	21,132	18,540	18,850	25,233	25,127	29,647	391,289	1. Number of Accidents
Percentage—Claims to Accidents	14.72%	21.87%	24.92%	29.48%	20.26%	28.94%	32.67%	34.54%	32.31%	32.01%	28.21%	29.38%	26.86%	21.15%	22.42%	21.30%	20.80%	20.31%	17.26%	18.34%	17.45%	24.10%	Percentage—Claims to Accidents
2. Number of All Claims	2,455	2,732	3,722	3,349	4,179	4,025	4,241	5,307	5,660	5,807	5,584	5,761	5,312	5,467	5,150	4,602	3,856	3,829	4,353	4,608	5,174	68,023	2. Number of All Claims
A Male	2,418	2,690	3,609	3,239	3,995	3,884	4,064	5,159	6,612	5,668	5,411	5,566	5,090	6,281	4,898	4,303	3,669	3,648	4,159	4,440	4,910	91,643	A Male
A Percentage—All Claims	98.40%	98.46%	96.97%	96.71%	96.59%	96.50%	96.74%	97.21%	97.38%	97.61%	96.90%	96.78%	95.82%	96.60%	95.11%	96.60%	96.15%	96.27%	95.54%	96.35%	95.48%	96.11%	A Percentage—All Claims
B Female	37	42	113	110	184	141	137	148	148	139	173	185	222	186	252	199	187	181	194	168	234	3,380	B Female
B Percentage—All Claims	1.51%	1.54%	3.03%	3.29%	4.41%	3.60%	3.26%	2.79%	2.62%	2.39%	3.10%	3.22%	4.18%	3.40%	4.89%	4.42%	4.85%	4.73%	4.46%	3.65%	4.52%	3.56%	B Percentage—All Claims
3. Number of Fatal Claims (Deaths)	204	300	202	201	179	151	166	168	140	162	155	180	147	177	151	108	116	107	114	137	152	3,390	3. Number of Fatal Claims (Deaths)
A Coal Industries	65	200	66	87	54	46	72	89	84	90	86	66	36	48	46	24	28	17	24	27	26	1,136	A Coal Industries
A Percentage—Fatal Claims	31.86%	66.66%	32.67%	43.28%	30.16%	30.46%	46.45%	47.62%	24.20%	32.90%	38.65%	31.11%	23.81%	27.11%	30.46%	22.22%	24.13%	15.89%	21.05%	19.71%	16.45%	33.45%	A Percentage—Fatal Claims
B Metal Industries	64	89	47	46	41	24	19	19	10	37	38	87	21	82	22	15	15	12	20	31	48	637	B Metal Industries
B Percentage—Fatal Claims	31.87%	13.00%	23.27%	22.88%	22.91%	15.89%	12.25%	11.31%	7.14%	24.34%	24.52%	26.56%	14.29%	18.08%	14.57%	13.88%	12.93%	11.22%	17.54%	22.63%	31.58%	18.76%	B Percentage—Fatal Claims
C Miscellaneous Industries	75	61	89	68	84	81	97	64	69	65	56	87	91	97	83	69	73	78	70	79	79	1,623	C Miscellaneous Industries
C Percentage—Fatal Claims	36.77%	20.34%	44.06%	33.84%	46.93%	53.65%	41.29%	41.07%	68.67%	42.76%	41.93%	48.33%	61.90%	54.80%	54.97%	63.88%	62.93%	72.90%	61.40%	57.66%	51.97%	47.79%	C Percentage—Fatal Claims
4. Number of Non-Fatal Claims	2,251	2,432	3,520	3,148	4,000	3,874	4,046	5,139	5,520	5,655	5,429	5,571	5,165	5,290	4,999	4,394	3,740	3,722	4,239	4,471	5,022	92,534	4. Number of Non-Fatal Claims
A Coal Industries	598	622	722	736	976	931	987	1,125	1,149	1,268	1,261	1,309	1,050	1,074	867	743	706	708	652	699	752	18,910	A Coal Industries
A Percentage—Non-Fatal Claims	26.57%	25.57%	20.51%	23.38%	24.40%	24.03%	24.39%	21.89%	20.82%	22.42%	23.23%	23.50%	20.33%	20.30%	17.15%	16.91%	18.87%	19.02%	15.38%	15.44%	14.97%	20.44%	A Percentage—Non-Fatal Claims
B Metal Industries	428	412	506	516	452	383	460	565	343	712	697	781	526	665	532	308	316	342	494	599	731	10,668	B Metal Industries
B Percentage—Non-Fatal Claims	19.01%	16.05%	14.37%	16.39%	11.30%	9.89%	11.37%	10.99%	6.21%	12.59%	12.84%	14.02%	10.18%	10.68%	10.64%	7.01%	8.44%	9.19%	11.65%	13.39%	14.56%	11.53%	B Percentage—Non-Fatal Claims
C Miscellaneous Industries	1,225	1,398	2,292	1,896	2,572	2,560	2,599	3,449	4,028	3,675	3,471	3,481	3,589	3,551	3,610	3,343	2,718	2,672	3,093	3,182	3,539	62,933	C Miscellaneous Industries
C Percentage—Non-Fatal Claims	54.42%	57.48%	66.12%	60.23%	64.30%	66.08%	64.24%	67.12%	72.97%	64.99%	63.93%	62.48%	69.49%	69.02%	72.21%	76.07%	72.67%	71.79%	72.96%	71.17%	70.47%	67.66%	C Percentage—Non-Fatal Claims
5. Awards by Commission	237	424	639	678	268	351	428	505	518	557	572	431	519	580	633	773	1,081	1,091	842	780	1,002	12,828	5. Awards by Commission
6. Awards by Referee	(*)	(*)	339	826	1,143	1,316	2,005	2,232	1,879	2,312	1,866	1,982	1,869	2,102	1,931	1,763	2,944	1,632	1,637	1,663	1,741	30,258	6. Awards by Referee
7. Compensation Agreements Approved	2,052	2,242	3,478	3,014	3,692	3,382	3,427	3,855	4,386	4,664	4,570	4,448	4,418	4,463	4,162	3,564	2,944	2,916	3,512	3,666	4,371	77,775	7. Compensation Agreements Approved
8. Amputations	212	175	213	154	131	120	124	189	164	152	178	187	151	188	163	189	105	175	139	199	193	3,151	8. Amputations
9. Loss of Use	128	57	45	27	20	22	18	28	19	52	56	98	76	115	176	178	126	208	137	209	238	2,025	9. Loss of Use
10. Permanent Total	7	6	8	5	7	9	15	30	32	40	25	18	23	24	11	16	8	6	8	5	12	305	10. Permanent Total
11. Permanent Partial	240	232	232	179	208	166	180	174	167	157	168	147	171	185	190	181	220	226	186	296	256	4,145	11. Permanent Partial
12. Temporary Total	2,013	2,177	3,066	3,267	3,748	3,661	3,866	4,965	5,169	5,468	5,241	5,406	4,971	5,081	4,798	4,207	3,512	3,491	4,239	4,170	4,791	87,307	12. Temporary Total
13. Temporary Partial	58	7	41	22	37	57	38	25	41	31	28	42	39	35	24	22	26	21	31	35	33	693	13. Temporary Partial
14. Facial Disfigurement	8	5	17	15	11	19	24	47	31	21	37	29	24	33	38	46	43	42	43	56	38	637	14. Facial Disfigurement
15. Blood Poison	11	64	58	47	94	131	67	73	84	69	52	45	61	78	58	51	33	24	33	58	36	1,262	15. Blood Poison
16. Wholly Dependent—Fatal Claims	120	131	74	88	63	54	62	58	64	83	80	98	90	109	107	65	88	80	70	100	75	1,768	16. Wholly Dependent—Fatal Claims
17. Partially Dependent—Fatal Claims	16	14	19	14	22	14	33	29	27	19	27	24	19	18	9	10	7	10	11	8	6	356	17. Partially Dependent—Fatal Claims
18. No Dependent—Fatal Claims	30	40	8	86	78	32	37	50	36	41	37	50	31	47	31	10	18	17	23	15	18	774	18. No Dependent—Fatal Claims
19. Foreign Dependent—Fatal Claims	32	69	8	12	16	11	23	31	18	9	11	8	7	8	4	7	8	---	3	---	1	271	19. Foreign Dependent—Fatal Claims
20. Compensation Denied	100	33	44	138	156	332	326	552	509	622	472	427	462	322	374	249	234	212	175	208	192	6,148	20. Compensation Denied
A. Fatal (Death)	19	10	12	32	32	47	57	81	36	41	30	30	39	31	34	24	16	16	10	27	28	652	A. Fatal (Death)
B. Non-Fatal	90	23	32	106	124	285	269	471	473	581	442	397	423	291	340	225	218	196	165	181	168	5,500	B. Non-Fatal
21. Compensation Reduced	7	4	4	16	17	37	13	14	14	9	8	9	7	5	0	7	9	8	7	12	10	217	21. Compensation Reduced
22. Average Weekly Wage	---	$20.87	$17.90	$21.29	$25.40	$26.04	$24 09	$25.35	$25.32	$25 02	$24.95	$25.49	$24.93	$25.12	$26.10	$24.66	$22.06	$19.24	$18.21	$19.94	$21.41	$23 18	22. Average Weekly Wage
23. Average Weekly Rate of Compensation	---	$7.54	$7.71	$8.56	$9.70	$9.76	$9.51	*$10.01	$10.83	$10.74	$10.63	$10.77	$10.79	‡$11.03‡	$11.56	$11.00	$10.24	$ 8.92	$ 8.66	$ 8.68	$ 9.50+	$ 9 81	23. Average Weekly Rate of Compensation

(*) No referee provided for in the 1915 and 1917 Workmen's Compensation Act.

* Effective August 1, 1023, the compensation rate was increased from $10 to $12 per week by the amended law. Prior to that date the average weekly rate of compensation payments was $9.65, and since the new law became effective, $10.96 per week.

‡Effective May 6, 1920, the compensation rate was increased from $12 to $14 per week by the amended law. Prior to that date the average weekly rate of compensation payments was $10.65, and since the amended law became effective, $0.81 per week.

COMPENSATION AWARDS—WORKMEN'S COMPENSATION DEPARTMENT

Classification	1915-16 Awards by Com'n	1917 Awards by Com'n	1918 Awards by Com'n	1919 Awards by Com'n	1919 Awards by Referee*	1919 Total for Year	1920 Awards by Com'n	1920 Awards by Referee	1920 Total for Year	1921 Awards by Com'n	1921 Awards by Referee	1921 Total for Year	1922 Awards by Com'n	1922 Awards by Referee	1922 Total for Year	1923 Awards by Com'n	1923 Awards by Referee	1923 Total for Year
1. Compensation:																		
Fatal—Granted	62	190	186	124	87	211	11	213	224	14	163	177	33	214	247	45	178	223
—Denied	5	21	19	21	11	32	3	29	32	7	40	47	4	53	57	6	75	81
Non-Fatal—Granted	61	57	116	193	161	354	21	360	381	21	503	524	46	682	728	96	1,102	1,198
—Denied	21	26	54	72	36	108	4	120	124	3	282	285	17	252	269	9	462	471
2. Compensation Increase:																		
Fatal—Granted	0	0	0	2	1	3	2	0	2	0	1	1	2	2	4	0	0	0
—Denied	0	0	1	0	0	0	1	0	1	0	0	0	0	0	0	2	0	2
Non-Fatal—Granted	0	0	1	0	4	4	1	9	10	5	40	45	8	30	38	9	29	38
—Denied	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3. Compensation Reduced:																		
Fatal—Granted	0	3	3	0	0	0	0	1	1	0	23	23	1	5	6	1	1	2
—Denied	0	2	0	0	0	0	0	1	1	0	3	3	0	0	0	0	1	1
Non-Fatal—Granted	3	2	2	5	11	16	0	7	7	2	12	14	2	5	7	1	11	12
—Denied	0	0	0	1	0	1	1	7	8	0	5	5	0	1	1	0	0	0
4. Lump Sum Settlements:																		
Fatal—Granted	6	19	62	40	0	40	31	0	31	23	0	23	27	0	27	27	0	27
—Denied	15	17	35	32	0	32	28	0	28	40	0	40	29	0	29	39	0	39
Non-Fatal—Granted	20	36	29	65	0	65	51	0	51	50	0	50	48	0	48	69	0	69
—Denied	7	3	10	29	0	29	17	0	17	30	0	30	22	0	22	33	0	33
5. Rehearings:																		
Fatal—Granted	0	4	2	17	0	17	10	0	10	11	0	11	10	0	10	7	0	7
—Denied	1	17	23	19	0	19	28	0	28	28	0	28	27	0	27	23	1	24
Non-Fatal—Granted	3	3	7	16	2	18	16	0	16	33	0	33	57	0	57	42	47	89
—Denied	3	14	18	23	0	23	34	0	34	56	0	66	73	0	73	49	0	49
6. Disfigurement:																		
—Granted	8	0	12	11	5	16	1	7	8	1	13	14	2	29	31	3	40	43
—Denied	1	0	1	0	0	0	0	3	3	0	5	5	0	3	3	0	4	4
7. Miscellaneous	21	20	38	8	21	29	8	69	77	17	53	70	20	40	60	34	64	98
8. Total Awards	237	424	639	678	329	1,017	268	826	1,094	351	1,143	1,494	428	1,316	1,744	505	2,005	2,510

Classification	1924 Awards by Com'n	1924 Awards by Referee	1924 Total for Year	1925 Awards by Com'n	1925 Awards by Referee	1925 Total for Year	1926 Awards by Com'n	1926 Awards by Referee	1926 Total for Year	1927 Awards by Com'n	1927 Awards by Referee	1927 Total for Year	1928 Awards by Com'n	1928 Awards by Referee	1928 Total for Year	1929 Awards by Com'n	1929 Awards by Referee	1929 Total for Year	1930 Awards by Com'n	1930 Awards by Referee	1930 Total for Year
1. Compensation:																					
Fatal—Granted	35	134	169	31	127	158	22	120	142	19	154	173	26	135	161	18	109	127	11	138	149
—Denied	7	29	36	12	29	41	9	21	30	5	25	30	8	31	39	8	23	31	11	31	42
Non-Fatal—Granted	156	1,122	1,278	166	1,274	1,440	117	1,279	1,396	100	954	1,054	101	960	1,061	93	1,032	1,125	110	1,125	1,235
—Denied	39	434	473	43	344	387	32	410	442	14	332	346	31	323	354	45	246	291	55	343	398
2. Compensation Increase:																					
Fatal—Granted	1	1	2	3	1	4	2	2	4	0	0	0	0	0	0	0	1	1	2	2	4
—Denied	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	0	0	0
Non-Fatal—Granted	19	33	52	14	23	37	10	26	36	7	6	13	5	21	26	5	14	20	2	15	17
—Denied	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3. Compensation Reduced:																					
Fatal—Granted	1	5	7	0	0	0	0	8	8	1	4	5	0	0	0	0	2	2	0	0	0
—Denied	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Non-Fatal—Granted	3	4	7	1	8	9	0	11	11	1	3	4	1	1	2	1	2	3	0	0	0
—Denied	0	0	0	0	1	1	0	0	0	1	1	2	0	0	0	1	0	1	0	0	0
4. Lump Sum Settlements:																					
Fatal—Granted	23	0	23	29	0	29	31	0	31	23	0	23	23	0	22	37	0	37	35	0	35
—Denied	26	0	26	22	0	22	20	0	20	15	0	15	19	0	19	25	0	25	22	0	22
Non-Fatal—Granted	89	0	89	84	0	84	106	0	106	75	0	75	109	0	109	110	0	110	123	0	123
—Denied	27	0	27	31	0	31	19	0	19	23	0	23	38	0	38	52	0	52	44	0	44
5. Rehearings:																					
Fatal—Granted	6	5	11	4	0	4	2	0	2	5	13	18	2	9	11	4	10	14	3	10	13
—Denied	2	0	2	6	0	5	0	0	0	5	0	5	3	0	3	2	0	2	2	0	2
Non-Fatal—Granted	48	38	86	23	31	54	27	205	232	30	133	163	36	181	217	40	121	161	67	135	202
—Denied	3	0	3	6	0	6	6	0	6	7	0	7	8	0	8	23	3	26	16	1	17
6. Disfigurement:																					
—Granted	4	20	24	1	15	16	4	33	37	2	27	29	0	24	24	2	31	33	4	38	42
—Denied	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	2	2	0	0	0
7. Miscellaneous	29	106	135	82	24	106	164	197	361	98	214	312	110	297	407	113	273	386	126	264	390
8. Total Awards	518	2,232	2,750	657	1,879	2,436	672	2,312	2,884	431	1,866	2,297	519	1,982	2,501	580	1,869	2,449	633	2,102	2,735

Classification	1931 Awards by Com'n	1931 Awards by Referee	1931 Total for Year	1932 Awards by Com'n	1932 Awards by Referee	1932 Total for Year	1933 Awards by Com'n	1933 Awards by Referee	1933 Total for Year	1934 Awards by Com'n	1934 Awards by Referee	1934 Total for Year	1935 Awards by Com'n	1935 Awards by Referee	1935 Totals for Year	1936 Awards by Com'n	1936 Awards by Referee	1936 Totals for Year	From Organization: Totals all Awards
1. Compensation:																			
Fatal—Granted	20	129	149	35	75	110	22	85	107	16	86	102	21	110	131	25	126	151	3,349
—Denied	9	24	33	9	16	25	18	22	40	10	10	20	11	27	38	14	28	42	741
Non-Fatal—Granted	115	1,006	1,121	163	920	1,083	157	835	992	149	820	969	118	906	1,024	165	945	1,110	18,637
—Denied	50	225	275	48	218	265	42	197	239	32	165	197	25	181	206	26	170	196	5,428
2. Compensation Increase:																			
Fatal—Granted	1	1	2	0	0	0	0	0	0	1	2	3	0	2	2	0	3	3	35
—Denied	0	1	1	0	0	0	0	0	0	0	0	0	2	0	2	0	2	2	10
Non-Fatal—Granted	5	21	26	13	10	23	5	18	23	7	19	26	13	10	23	27	27	54	512
—Denied	0	0	0	0	0	0	5	12	17	3	9	12	10	2	12	6	7	13	54
3. Compensation Reduced:																			
Fatal—Granted	0	2	2	0	0	0	0	0	0	0	1	1	0	2	2	0	3	3	68
—Denied	0	0	0	0	0	0	0	0	0	0	1	1	0	0	0	0	3	3	12
Non-Fatal—Granted	0	4	4	0	9	9	3	8	11	2	5	7	2	10	12	5	9	14	155
—Denied	0	1	1	1	1	2	2	1	3	1	1	3	2	0	2	0	4	4	33
4. Lump Sum Settlements:																			
Fatal—Granted	33	0	33	51	0	51	37	0	37	25	0	25	28	0	28	33	0	33	632
—Denied	32	0	22	12	0	12	16	0	16	11	0	11	24	0	24	22	0	22	491
Non-Fatal—Granted	134	0	134	150	0	150	152	0	152	128	0	128	101	0	103	145	0	145	1,866
—Denied	44	0	44	67	0	67	85	0	85	51	0	51	52	0	52	73	0	73	757
5. Rehearings:																			
Fatal—Granted	6	11	17	2	3	5	2	1	3	1	3	4	3	4	7	5	4	9	179
—Denied	5	0	5	6	0	6	6	0	6	4	1	5	7	2	9	7	5	13	230
Non-Fatal—Granted	83	171	254	96	264	360	114	129	243	97	268	366	86	128	213	90	111	201	2,977
—Denied	54	5	59	54	7	61	105	5	110	106	6	112	98	6	104	98	5	103	902
6. Disfigurement:																			
—Granted	2	55	57	6	30	36	6	36	42	10	33	43	7	40	47	5	41	46	608
—Denied	0	5	5	1	0	1	1	2	3	2	4	5	2	6	7	1	5	6	48
7. Miscellaneous	185	270	455	367	230	597	223	281	504	186	203	389	176	228	404	255	242	497	[illegible]
8. Total Awards	768	1,931	2,699	1,081	1,783	2,864	1,001	1,532	2,633	842	1,637	2,479	789	1,063	2,152	1,002	1,741	2,743	43,081

*The figures shown in this column cover the seven months from May 1, 1919, to November 30, 1919, as no Referee was provided previous to May 1, 1919

TABLE OF CASES REPORTED

References Are Made to Index Numbers

KOSMOS vs. INDUSTRIAL COMMISSION OF COLORADO
96 Colo. 90
I. C. 66538 **39 P. (2nd) 780** **Index No. 198**

HILLIARD, Justice.

In a proceeding under the Workmen's Compensation Act, the claimant, plaintiff in error, displeased with the holding of the commission, instituted an action in the district court, where, October 1, 1934, judgment sustaining the commission was entered. The writ of error was sued out November 14, 1934. Defendants in error move to dismiss the writ, for that it was not timely procured.

It would seem, our previous pronouncements considered, that the motion must be granted. Lawrence v. Industrial Commission, 91 Colo. 179, 13 P. (2d) 261; General Chemical Co. v. Thomas, 71 Colo. 28, 203 P. 660. In the Lawrence Case we examined section 106 of the Industrial Commission Act, as amended in 1931 (Sess. Laws 1931, p. 825), and in the Thomas Case the same section as originally enacted (Sess. Laws 1919, p. 744, C. L. 1921, §4480); the sum of our determination being that the section operates as a short statute of limitations. One of the great purposes of the Compensation Act was to avoid the delay attending ordinary litigation. In the district court the trial is without a jury and upon the record returned by the commission (Sess. Laws 1919, p. 744, §105, C. L. 1921, §4479). Our inquiry is limited to law questions, and is summary; the case to enjoy preference on the calendar (Sess. Laws 1919, p. 744, §108, C. L. 1921, §4482).

Let the order be that the writ of error is dismissed.

ADAMS, Chief Justice, and CAMPBELL, Justice, concur.

THE ROCKY MOUNTAIN FUEL COMPANY, et al., vs. ARTHUR CANIVEZ
96 Colo. 198
I. C. 77283 **40 P. (2nd) 618** **Index No. 199**

HOLLAND, Justice.

On January 14, 1933, Arthur Canivez, to whom reference is hereinafter made as claimant, sustained a personal injury as the proximate result of an accident arising out of and in the course of his employment with the Rocky Mountain Fuel Company which, with its insurance carrier, we will designate as respondents. The injury consisted of a hernia on the right side at or near the operative scar of a previous hernia sustained in 1931. Claim was made before the Industrial Commission of Colorado, one of the defendants in error, to which we will refer as the commission. After hearings, compensation for temporary disability was allowed and paid to claimant, and on October 3, 1933, a referee of the Commission made a finding to the effect, that the claimant had not sustained any permanent disability, and that temporary disability terminated July 31, 1933. A review of this finding was requested and allowed, and November 2, 1933, the commission confirmed the finding and award of the referee, following which, other proceedings were had resulting in a supplemental award by the commission December 27, 1933, in which it again confirmed its award of November 2nd. January 15, 1934, the claimant, through counsel, applied for reopening on the ground that the commission had erred in its award of November 2, 1933, and in support thereof, set forth a number of grounds for reconsideration. January 18, 1934, the Commission entered an award, reciting that it had reviewed the files, and petition of the claimant to reopen the case on its own motion, and being sufficiently advised, found that another hearing should be had to determine whether or not there had been error, mistake or change in condition. Thereupon followed notice to all parties in interest, of a further hearing to be had January 31, 1934. After various hearings, the commission, May 26, 1934, entered its award to the effect that the former award of November 2, 1933, was in error in holding that the claimant had suffered no permanent disability. It made a finding that the claimant had a 40 per cent permanent disability as a working unit and fixed compensation at the rate of $6.73 per week until claimant had received a total sum of $3,638.18. The respondents petitioned for a review of this award which was granted, and July 3, after reviewing the entire case, according to its recitals, the commission again, by its so-termed supplemental award, found that it was in error in its award of November 2, 1933, and confirmed its award of May 26, 1934, wherein it had determined and fixed permanent disability. Thereafter this action was filed in the district court, where, after hearing, the award of the commission as finally made, was confirmed, and error is assigned.

The last or supplemental award contains the following: "Sometime after the Commission affirmed its award of November 2, 1933, the doctors' reports were again read, and the Commission again reviewed the entire file in this case. After so doing, it was decided that a mistake had been made and that previous awards were in error in finding that this claimant had sustained no permanent disability as a result of the accident. It was, therefore, decided that the claimant was entitled to another hearing to determine if any error or mistake had been made." This is the decision upon which counsel for respondents base their contention that error was committed and for which they seek a reversal of the judgment. The tenor of this contention is to the effect that the commission acted without and in excess of its powers as set forth in the statute governing the reopening of such

cases upon the commission's own motion, in that by the wording of the above-quoted portion of the finding, it had prejudged or decided that a mistake had been made, prior to a hearing to determine if such mistake had actually been made. He further contends that there is no evidence to support a finding of permanent disability, as made by the final awards, which had not been fully presented before the commission prior to making of its previous awards, whereby it was determined that there was no permanent disability. It is insisted that under the decisions of this court, when a case is reopened on the commission's own motion, on the ground of error, mistake or change of condition, it is necessary that a finding of the existence of such ground should be supported by the evidence, and counsel strongly urges that both parties were entitled to a decision of the issues before the commission upon a full consideration of the case and contends that the action of the commission in prejudging the case before a hearing, is irrefutably proven by the statement contained in the award.

Standing alone, as the findings and award, or as the basis for reopening the case, the above-quoted paragraph might be reasonably sufficient upon which to base the contention made by counsel; but it is only a part of the final findings and award, which taken as a whole, seem to be sufficient under the rule laid down in *Hayden Bros. Coal Corp. vs. Industrial Commission*, 90 Colo. 503, 10 P. (2d) 325; *Sherratt et al. vs. Rocky Mountain Fuel Co. et al.*, 91 Colo. 269, 30 P. (2d) 270.

The part to which objection is made can be considered as mere surplusage and unnecessary to the sufficiency of the finding, and, moreover is an after recital of the commission's actions at the time of the entry of the order reopening the case. Had this appeared in the order or finding that a mistake had been made, at the time the case was reopened, it would not have changed the situation which was the ultimate result of the commission's action herein. The contention that the commission had prejudged or decided that a mistake had been made does not fit the facts. Long before the entry of the award containing this statement, the commission had, by its award of January 15, 1934, after a review of the files, and particularly upon application of claimant to reopen the case, found that a hearing should be had as to whether or not there had been error, mistake or change of condition, and it held a hearing thereon, the result of which was the finding of which complaint is made. When claimant applied for reopening of the case on the ground of error, mistake or change of condition, it was necessary, for the disposition of claimant's application, that a decision be made. The commission was required to decide, either that there had been no mistake and deny the application, reaffirm its former award, or decide that a hearing should be had to determine the probability of such mistake or error. The evil of allowing the commission to reopen such cases and change an award without reasons or findings, as counsel points out, is apparent, and this court has laid down the rule that the reasons for findings are mandatory. In this case, there has been a compliance with such rule as will be apparent from a reading of the commission's final award, which is fully set out in the record and is as follows:

> "In the above-entitled cause, the Commission having further considered the entire file as prayed by the application for review, filed by the respondents, June 6, 1934, and having considered the brief of the respondents, and being now fully advised in the premises, finds:
>
> "That this claimant sustained an accident arising out of and in the course of his employment January 14, 1933, and left work upon that date. His injury consisted of a right inguinal hernia, the appearance of which was preceded by accidental strain and accompanied by pain. His temporary total disability terminated August 1, 1933. His average weekly wages were $13.46.
>
> "On October 3, 1933, the Referee awarded compensation to the claimant at $6.73 per week, from January 25, 1933, to July 31, 1933, both dates inclusive, as compensation for temporary disability, and found that the claimant had no permanent disability as a result of his accident of January 14, 1933.
>
> "Upon petition for review by the claimant, this Order was affirmed by the Commission, in an award dated November 2, 1933, and upon application for review, the Commission on December 27th, 1933, affirmed its award of November 2, 1933.
>
> "Sometime after the Commission affirmed its award of November 2, 1933, the doctor's reports were again read, and the Commission again reviewed the entire file in this case. After so doing it was decided that a mistake had been made and that previous awards were in error in finding that this claimant had sustained no permanent disability as a result of the accident. It was, therefore, decided that the claimant was entitled to another hearing to determine if any error or mistake had been made. On January 12, 1934, the Commission ordered another hearing, which was held on January 31, 1934, at which hearing two doctors' reports were filed and the hearing was continued to the next trip of the referee to Boulder, Colorado. A hearing was held at the Court House in Boulder at ten o'clock a. m., April 18, 1934.
>
> "After reviewing the entire file, including the last two hearings, the Commission is of the opinion that the previous awards of the Commission were in error when it found that this claimant had sustained no permanent disability as the result of his accident.
>
> "Therefore, the Commission finds that the claimant herein at the present time has, as a result of his accident, sustained forty per cent permanent partial disability as a working unit.

"The claimant's age was forty-three years; his expectancy of life is 23.99 years.

"It is, therefore, ordered that the respondents above named pay compensation to the claimant at $6.73 per week, from August 1, 1933, and continuing thereafter at the same rate, until the full sum of $3,638.18 shall have been paid, as compensation for claimant's permanent partial disability."

The contention of counsel for respondents that there was no different or additional evidence before the commission when it changed its award, from that produced before the commission when it made its former, and essentially different award, and that therefore there was no evidence before the commission upon which to base its final award, is unavailing, for the reason that the original award was based upon conflicting evidence, as to the effect of which reasonable minds could have differed. By a reconsideration, the commission might well have found that it had improperly weighed this evidence; but in addition thereto, witnesses were examined, reports reviewed and there was ample opportunity for the commission to abandon its former conviction. We must assume—in the absence of any showing of fraud—that the Commission itself was satisfied that it had made a mistake; and considered that it was its plain duty to correct the same, and we are not prepared to say that there was no substantial evidence to support such a change of opinion.

Courts should not allow the commission to change or alter its award through caprice, and without any stated reasons, either for reopening the case, or as the basis of the findings supporting an award; but there will be no interference with its discretion to review an award unless the discretion is clearly abused, or there is a showing of fraud, when there is evidence upon which it can determine the issues in favor of, or against the claimant, that would reasonably support a change of conclusion.

There is evidence to support the final and supplemental award of the commission and therefore the judgment of the trial court in sustaining the award of the Commission was correct and is affirmed.

MR. JUSTICE CAMPBELL not participating.

THE MOFFAT COAL COMPANY, et al., vs. FRANK PODBELSK, et al.
96 Colo 355
I. C. 75434 **42 P. (2nd) 1001** **Index No. 200**

HILLIARD, Justice.

A proceeding under the Workman's Compensation Act before the Industrial Commission. Podbelsk was the claimant; the Moffat Coal Company was the employer; and the Mutual Insurance Company was the Insurer. The claimant prevailed before the commission and in the district court. The employer and the insurer assign error.

July 13, 1932, claimant was accidentally injured in the course of his employment; July 21, 1932, the employer filed report of the accident; July 25, 1932, the insurer filed notice of contest; September 8, 1932, claimant filed claim for compensation; October 10, 1932, the employer and the insurer admitted liability for compensation at $6.85 per week, to begin July 24, 1932, and during disability, and for such permanent disability as might thereafter be determined to exist; May 10, 1933, a referee of the commission found that claimant's temporary disability terminated that day, and that there had been no permanent disability; June 15, 1933, the commission adopted and confirmed the referee's order, as its award, February 3, 1934, claimant filed petition to reopen the case, and February 7, following the commission ordered that a further hearing be had; May 26, 1934, the commission affirmed its order of June 15, 1933; June 26, 1934, claimant filed a further petition to reopen, supporting it by affidavit of one Peterson and certificate of the employers' doctor; July 2, 1934, the commission ordered further hearing, and September 12, 1934, found "That the claimant's condition has become progressively worse since the award of June 15, 1933, * * * and that the claimant was disabled to an extent equivalent to 35% of permanent total disability," and, effective May 10, 1933, ordered that payment at $6.85 per week be resumed, and continued until $2518.33, less $10.76 overpayment made on the original award, shall have been paid; September 14, 1934, the employer and the insurer filed petition for review, and on the 20th of the same month the petition was denied, the award of September 12, 1934, being made final; September 26, 1934, the employer and the insurer filed complaint in the district court, seeking reversal of the commission's award, where, December 7, 1934, the award was affirmed; December 31, 1934, writ of error issued.

The contentions are: (1) That the award is not supported by any evidence; (2) that the commission's findings do not warrant its award of September 12, 1934. We discuss them together.

It is argued that since the ground upon which the commission elected to base its modification of the award of June 15, 1933, was that claimant's condition had become progressively worse, not shown, as said, the commission was concluded. The statute provides that for "error, mistake or a change of conditions, the commission may at any time * * * review any award and on such review, may make an award ending, diminishing, maintaining or increasing the compensation previously awarded." C. L. 1921, Sec. 4484. The new evidence was to

the effect that claimant's injury was more extensive than had appeared from the earlier inquiry, not that his condition had "become worse," as the commission recited. We think, however, that while the commission could have employed more fortunate words, the import of its finding of September 12, 1934, is that from the beginning claimant's condition justified the extended award. The evidence warranted that determination, and the law authorized it. The procedure was apt. *Rocky Mt. Fuel Co. vs. Canivez,* .. Colo. .., 40 P. (2d) 618.

Let the judgment be affirmed.

MR. CHIEF JUSTICE BUTLER and MR. JUSTICE CAMPBELL concur.

THE ROCKY MOUNTAIN FUEL COMPANY vs. WILLIAM L. SHERRATT, et al.

96 Colo. 463

I. C. 63993 **45 P. (2nd) 643** **Index No. 201**

BURKE, Justice.

Plaintiffs in error are hereinafter referred to as the Fuel Company and the Insurance Company respectively, defendants in error William L. Sherratt as Sherratt and the Industrial Commission of Colorado as the Commission.

This is a Workmen's Compensation case. The Insurance Company carried the Fuel Company's insurance. While employed by the Fuel Company Sherratt was injured in an accident growing out of and in the course of that employment. The history of this case up to March 5, 1934, in so far as material here, will be found in Sherratt vs. Fuel Company, 94 Colo. 269; 30 Pac. (2d) 270, which involved the same accident and the same injury, hence that history is not now repeated.

April 2, 1934, the Commission, apparently on its own motion and for the purpose of considering possible error in its former award, or changed conditions, set a hearing for some two weeks later, which was continued on May 29, July 6, and August 7, following. Some testimony, including reports of physicians, was taken on each of said dates. Thereupon the cause was submitted and briefs filed and, September 21, 1934, the Commisson affirmed its former award, finding no error, mistake or change in conditions, holding that the case would not be reopened, and that "the claim for further compensation be and the same is hereby denied."

October 16, 1934, by supplemental award, the Commission found error in its former award against Sherratt, that he had in fact sustained a ten per cent permanent injury, that former awards in his favor should be reinstated, and that payments thereunder should be renewed as of the date when discontinued. It thereby reinstated its award of June 29, 1933, which the district court had annulled, and which judgment we had affirmed in Sherratt vs. Fuel Company, *supra.* This it did on the identical evidence on which it held the contrary less than one month before, and with no finding save that "after an exhaustive study of all the evidence herein" it was the opinion of the Commission "That it committed error in its award." This of course amounts to nothing more than a statement that "the Commission has changed its mind."

It is true that in Rocky Mountain Fuel Co. vs. Canivez, No. 13619, decided January 21, 1935, ... Colo. ....; 40 Pac. (2d) 618, some countenance is apparently given to the power of the Commission to so act. The language there used is "by a reconsideration, the Commission might well have found that it had improperly weighed this evidence." But since, in the Canivez case, there had been considerable additional evidence, as the author of the opinion points out, the above quotation, if accepted at its face, which it should not be, was mere dictum. If, with no additional evidence, and with no reasonable explanation, the Commission may re-hear on its own motion, and make flatly contradictory findings and awards, then claimants, employers and insurance carriers may alike be the victims of mere whim and caprice, and with no evidence of fraud, error, mistake or changed conditions, awards may be entered, withdrawn and reversed, and this process, like Tennyson's brook, may go on forever. The ancient maxim that there must be an end of litigation should still have some applicability, even in Workmen's Compensation cases. At best, the difficulties and uncertainties surrounding the administration of this law are sufficiently disconcerting and discouraging without making its judgments wholly dependent upon mental stability.

In Sherratt vs. Fuel Company, *supra,* we said:

> "Any supplemental award that would change, alter or modify the effect of the award of April 9, 1931, by which the claimant was found to have fully recovered from his injury, would require specific findings as to a change in this recovered condition."

In the same case we said: "Reasons for findings are mandatory." That statement applies to errors as well as changed conditions, and to it we now add that mere "change of mind" with no statement of sufficient reasons therefor, is no compliance with the law.

The judgment is reversed and the cause remanded to the district court with directions to enter judgment instructing the Commission to vacate its award of October 16, 1934, and reinstate that of September 21, 1934.

MR. CHIEF JUSTICE BUTLER, MR. JUSTICE YOUNG and MR. JUSTICE HOLLAND concur.

AUGUST FRANK and INDUSTRIAL COMMISSION OF COLORADO vs. BLACK DIAMOND FUEL COMPANY.

96 Colo. 365

I. C. 78890 **43 P. (2nd) 158** **Index No. 202**

See also No. 195

HOLLAND, Justice.

August Frank, a claimant under the Workmen's Compensation Act, was employed by the Black Diamond Fuel Company. His claim, filed August 4, 1933, was based upon an alleged injury occurring October 11, 1932, and states that in the course of his employment in the coal mine of his employer, he strained himself while helping to lift a mine car. A hearing, with claimant as the only witness testifying, was held before a referee of the Industrial Commission December 20, 1933. By a finding dated January 12, 1934, the referee rejected the claim upon the ground that it was barred by amended Section 84 of the Workmen's Compensation Act which provides that the right to compensation shall be barred unless within six months after the injury a notice claiming compensation shall be filed with the commission, the limitation not to apply if compensation has been paid to the claimant. Upon this finding, the commission entered its award rejecting the claim, which action later was affirmed by the district court. Upon review, the judgment of the district court was reversed by this court, and the case remanded to the district court to enter judgment directing the commission "First to hold a further hearing solely on the issue of how much compensation should be awarded, and to make, on the evidence there taken a proper award of compensation to the claimant." Frank vs. Industrial Com., 96 Colo. 364, 43 P. (2d) 158. Thereupon the district court entered its order directing the commission "* * * to hold further hearing or hearings solely on the issue of how much compensation should be awarded to the claimant, the same to be based solely upon evidence taken before such commission or the referee thereof upon the amount of disability that the claimant has sustained as a result of his accidental injuries. * * *."

From the statements of counsel for both claimant and employer, it now appears that in attempting to follow the mandate of this court and the order of the district court based thereon, uncertainty arose as to the extent of the hearing to be conducted. Claimant's counsel contended that the only question to be determined was the amount of compensation his client was entitled to receive and, apparently confident of his position, he offered no further proof of the other questions involved, namely: That the claimed injury occurred in the course of claimant's employment; and that compensation in the way of medical service was paid to him. Claimant further objected to the introduction of evidence on any of these matters by the employer and objected to employer's counsel going into the questions upon cross-examination. Counsel for the employer, faced with the decision of this court, holding that a compensable injury had occurred, although given some latitude in the matter, was not as free to proceed as the occasion required. To what extent this confusion, on the part of claimant, employer and the commission, is reflected in the present award, cannot be estimated.

The only issue presented upon the former review was whether the claim was barred by the statute of limitations, which included the question of whether it was saved from the statutory bar by the payment of compensation, within the statutory period, if such could be said to have been paid by reason of medical services furnished the claimant. This court resolved that question in claimant's favor, upon, as then stated, a prima facie case made by his own testimony. Full opportunity to present these issues was not afforded the parties before the referee, and neither party insisted upon the rights which the statute contemplates and provides in such cases. This situation arose largely, it appears, through a miscomprehension of the procedure to be followed in such matters. The record disclosing such a situation, it is evident that the commission did not have, or at least did not take the opportunity to fully hear and determine the issues raised, and it follows that this court, in view of the partial evidence introduced, should not have precluded either party from following the issues first presented to a conclusion. This it did, by its holding—which it is claimed by defendant in error became the law of the case—in effect, that a compensable injury had occurred for which compensation had been paid. The showing made by claimant upon the original hearing was sufficient to have called for a full presentation of the claim and defenses thereto, the result of which should have disclosed: First, whether the injury occurred in the course of employment; second, whether it was compensable; and third, whether the medical treatment received by claimant could properly be held to be the payment of compensation within the meaning of the statute. It follows that this court should have reversed the judgment with directions to the lower court to set aside its judgment and transmit to the commission a statement of the issues not fully presented, staying its proceedings until the commission should hear and determine such issues and return its findings to the court. This would be in accordance with the provisions of section 4476, C. L. '21, which is as follows:

"If upon trial of such action it shall appear that all issues arising in such action have not theretofore been presented to the commission in the petition filed as provided in this act, or that the commission has not theretofore had an ample opportunity to hear and determine any issues raised in such action, *or has for any reason, not in fact heard and determined the issues raised,* the court shall, before proceeding to render judgment, unless the parties

to such action stipulate to the contrary, transmit to the commission a full statement of such issue or issues not adequately considered, and shall stay further proceedings in such action until such issues are heard by the commission and returned to said court. * * *"

Our former decision in *Frank vs. Industrial Commission,* supra, is overruled; the judgment in the present case is reversed and the cause remanded with instructions to the trial court to set aside its judgment, stay the proceedings and transmit to the Industrial Commission the issues to be considered with directions to fully hear and determine all questions presented, and return its findings on the same to the court for its judgment thereon.

MR. JUSTICE YOUNG concurs in part and dissents in part.

MR. JUSTICE HILLIARD and MR. JUSTICE BOUCK dissent.

No. 13,910
Black Diamond Fuel Co. vs. Frank.

June 29, 1936.

MR. JUSTICE HILLIARD dissenting.

I think orderly processes require affirmance. What we said in our former consideration (96 Colo. 364, 43 P. (2d) 158) established the law of the case. Both the trial court and the commission followed the law so announced. Regardless of what on another occasion may be held to be the law, departure here appears to be violative of first principles. I may add that if I were disposed to examine along the broad lines of the court's present pronouncement, and should agree generally with the result reached, I would, nevertheless, dissent from the holding that the issue of the statute of limitations was not finally determined in our former decision. On that point I am in agreement with the special concurring opinion of Mr. Justice Young.

Black Diamond Fuel Co. vs. August Frank.
No. 13,910

June 29, 1936.

MR. JUSTICE YOUNG, concurring in part and dissenting in part.

I concur in a part of the opinion of Mr. Justice Holland and dissent in part. I think the case should be sent back for a determination of all issues, except that of whether the statute of limitations applies.

As I view the matter, the sole issue before us when the case was before presented was whether the statute of limitations applied. *Frank vs. Industrial Commission,* 96 Colo. 364, 43 Pac. (2d) 158. In going beyond that issue and determining that a compensable injury had been sustained, when the commission had not acted upon that question, I think we determined issues not properly before us, and in so doing circumscribed the parties on the second hearing, so that issues there proper for determination were not and could not be acted upon. I now believe it would have been logical and the better practice in the former case to have required the commission to determine whether claimant sustained a compensable injury before determining the issue of whether his claim was or was not barred by the statute of limitations; but since the issue of the statute of limitations was raised and, as I believe, correctly determined, our former opinion on that question should stand and the case should be sent back to determine all other issues involved except that of the statute of limitations.

On Rehearing.

BOUCK, Justice.

The case at bar was at first considered in a department of three justices. An opinion was handed down, reversing the judgment of the lower court. While a petition for rehearing was pending, a number of attorneys asked and obtained leave to file, and did file, briefs as amici curiae. They requested that the petition for rehearing be considered and decided by the court en banc. This has been done. A rehearing having been granted, the previous opinion was withdrawn; and, the case having since been orally argued by counsel and duly considered by the court en banc, the present opinion—also reading for reversal—is hereby substituted, with such amplification as seems called for by the arguments advanced in the briefs.

The plaintiff in error, August Frank, claims under the Workmen's Compensation Act as an injured employee of the Black Diamond Fuel Company. The Industrial Commission refused to award compensation. The claimant duly instituted his action in the district court to compel a contrary decision. That court, however, affirmed the commission's order, and this is the judgment we are asked to reverse.

The claim here asserted is for compensation on account of a ruptured appendix, with subsequently resulting peritonitis. The injury occurred while the claimant was lifting a mine car in the company's coal mine. He consulted the company's physician, who examined him, had him removed to a hospital, and saw that an appropriate operation was performed.

Though the accident happened on October 11, 1932, it was August 4, 1933, when the claimant filed a formal notice of his claim with the commission. Nearly four months had then elapsed since the expiration of the six-month period fixed by section 84 of the Act, hereinafter quoted. (The Commission's record before us seems to indicate that a prior notice had been filed the last

part of June or first part of July, about one month earlier, but for our present purpose this point is immaterial.)

On August 9, 1933, the commission received from the company's insurer a "notice of contest," dated the 8th, denying liability on the following alleged grounds: (1) that the injury does not come within the provision of section 15 of the Workmen's Compensation Act, (2) that, if any compensation be due, it should be reduced 50 per cent under section 83 of the Act, (3) that the average weekly wages were not to exceed $10, (4) that notice was not given in time as provided by section 31 of the Act, nor filed in time as provided by section 84 thereof, and (5) that disability terminated within the ten-day waiting perlod.

Of the above five grounds, (1) and (4) are the only ones which under the evidence in the record call for consideration; and under (4) only section 84 need be discussed, since the evidence shows that a verbal notice was given to the superintendent of the company immediately after the accident.

On August 11, 1933, the commission received a letter from the insurer, enclosing a letter received by it from the company and dated two days earlier, which stated that the claimant was not injured while in the company's employ, that he "had an attack of appendicitis and was taken by Dr. Snair (one of the company physicians) to the Community Hospital and from there to the County Hospital where he was operated upon," and that he "remained at the County Hospital for some time." By way of unimportant correction, it may be said that the claimant was not operated upon at the County Hospital, but, according to the uncontradicted evidence, at the Community Hospital, whither he was taken by the company physician as already stated.

On December 28, 1933, the commission received from the company a letter dated the day before, stating that the claimant "was not hurt in the * * * mine," but "became ill at home and not due to any cause of his labor. * * * Some time after Mr. Frank was taken to the hospital, news came to us that he had been operated on for some intestinal trouble and also his appendix was removed, therefore we did not feel or believe it was a case of injury."

The denying attitude thus expressed by the company and its insurer was uniformly preserved. From the very beginning of the controversy, the company contended that the injury was not sustained in the course of the claimant's employment and did not arise out of it; but it introduced no evidence to support this contention. The claimant emphatically stated the contrary, and his uncontradicted evidence in substantiation of the statement is before us.

The referee of the commission duly held a hearing, pursuant to notice, on December 20, 1933. Both sides appeared by counsel. The claimant was the only witness called by either side. He told a consistent story to the effect that his injury arose out of, and in the course of, his employment while he was at work inside the company's mine when he received a strain followed by the rupture of his appendix. He also testified that he gave notice of the injury to the employer company forthwith. The medical, surgical and hospital treatment necessitated by his condition are amply attested. A part of this treatment is shown to have been given by the company physician; the remainder is shown to have been given under authority from him. The company brought in no witnesses; neither the superintendent to whom the claimant gave prompt verbal notice of the injury; nor any of the employees mentioned by the claimant as present when the injury occurred; nor either of the two company doctors who had examined and passed the claimant when he went to work for the company only two weeks before, and who were both present when the operation was performed after the injury.

Under the evidence before it, and in the total absence of testimonial refutation or impeachment, the commission could properly make no other finding than that the injury was compensable.

In spite of the fact that the claimant's testimony stood thus uncontradicted and unimpeached, the commission's referee on January 12, 1934, rejected the claim. His order contains the following findings: "Claimant was employed as a miner, by the above named respondent employer. On October 11, 1932, while pushing a loaded coal car, claimant alleges to have sustained injuries which forced him to leave his employment on October 13, 1932. Claimant's disability resulted from the rupturing of his appendix and possible other internal injuries. * * * On or about October 12th, the claimant called the company doctor and received attention, operative treatment and hospitalization. The respondent employer has steadfastly maintained that claimant's condition was not the result of accidental injury. Claimant did not file his claim for compensation until August 4, 1933, or nearly ten months after the commencement of his disability. The referee finds from the evidence that claimant's claim for compensation is barred by Section 84 of the Workmen's Compensation Act * * *." That section, of course, relates, by its express terms, only to claims for compensable injuries.

The company, for the manifest purpose of avoiding any liability resulting on account of the compensable injury established as aforesaid, invoked the bar of the following statute: "* * * The right to compensation and benefits, as provided by this Act, shall be barred unless within six months after the injury, or within one year after death resulting therefrom, a notice claiming compensation shall be filed with the commission * * *." C. L. 1921, Sec. 4458 (as amended by S. L. 1923, page 745, Sec. 15), being the above mentioned section 84 of the Workmen's Compensation Act.

There is no doubt that the six-month period prescribed for filing notice with the commission had elapsed without such filing.

To obviate this purported defense, and avoid the apparent bar, the claimant relies upon the sentence immediately following the passage just above quoted, namely: "This limitation shall not apply to any claimant to whom compensation has been paid." *Ibid.* He contends that the furnishing of the services rendered by, or under the direction of, the company's physician constituted—in view of the power and authority granted the physician by the company's contract described below—the payment of compensation within the meaning of the language used. The real question in the case is whether it did.

The question is answered in the negative by the attorney for the company. He earnestly argues that the company neither authorized nor knew of the services rendered by or by direction of its doctor, and that the company did not pay for them.

Of course, in order to bind the company, its authority for rendering the services must appear. If they were rendered by its authority, it is immaterial whether it knew about the specific services or not.

Prior to the alleged accident the employer company adopted a medical plan, approved by the commission, whereby it entered into a contract with a certain physician, who therein agreed to "furnish such medical, surgical and hospital treatment, medical, surgical and hospital supplies including crutches and apparatus as may reasonably be needed at the time of the injury of any of the * * * employees (provided such injury occurred while such employee is in the performance of his duties under his employment * * *) and thereafter during his disability but not exceeding four months from time of accident nor $500 in value to cure and relieve from the effects of the injury * * *." In the contract the company promised to pay to the physician, within fifteen days after each statement for services of the preceding month, "the usual fees and charges which (he) charges others, however, not to exceed the maximum fee schedule adopted by the Industrial Commission." The physician was, by the contract, duly authorized to employ all needed assistance. Under the contract, no duty rested upon the employees to give the company any notice of the treatment.

By the same contract—but in a manifestly separable part thereof—the company agreed to collect by deducting from the wages of each employee, and to pay over to the physician, one dollar and a half or one dollar per month, depending upon whether the employee was a married man or not. In consideration of this deduction from wages the physician agreed "to furnish medical care, medicines (antitoxins and special medicines excepted) as are needed in cases of sickness (with the exception of venereal and obstetrical cases) to all employees * * * said employees to receive such treatment at the mine office, the office of (the physician) or at their home * * *." The proper amount hereunder was deducted from the claimant's wages.

It is not necessary for the purposes of this opinion, and in this particular case it would not be proper, to determine the exact scope of the last quoted passage, which applies when there is no compensable injury, but is not involved herein. It is not now for us to decide whether in the event of a non-compensable injury the claimant would be entitled, free of charge in whole or in part, to all or any of the services and supplies actually furnished in the present instance. According to the evidence before us the ruptured appendix and its direct and natural consequences were due to the strain brought on by, and in the course of, the claimant's employment; in other words, the fact of a compensable injury had been proved, and presumptively he had a right to compensation under the Workmen's Compensation Act. The assessment part of the contract, governing non-compensable injury or illness, consequently does not apply. The sole issue, as above stated, is whether under the facts of this case the furnishing of medical and hospital services removed the bar created by section 84 of the Act.

We do not hold—nor is it necessary to hold herein—that whenever a compensable injury is sustained, and medical treatment is furnished by the employer, this in and of itself takes a case out of the statute. Under the Workmen's Compensation Act, the employer company is absolutely liable for the expense of medical services necessitated by a compensable injury. There is no doubt that, under the facts appearing in the record, the services rendered for the compensable injury here established by the evidence operated to avoid the bar of the statute. The company's contract recognized its liability to render, or to pay the expense of, such services, and conferred upon its physician general authority for furnishing those services and supplies in all such cases. Hence, inasmuch as all the evidence shows that the claimant did sustain a compensable injury of which the company forthwith received actual notice and knowledge the treatment given him fell within the class which, under both the statute and the contract, imposed upon the company unqualified financial responsibility. Whether the company would have been charged with such responsibility if it had not had actual notice or knowledge, need not now be determined or considered. Here such notice or knowledge was proved. And by the express terms of the contract, the treatment was to be given just as was done. This, so far as the claimant is concerned, was (at least under the facts shown herein) the exact equivalent of payment; and he was thereby exempted from the requirement of serving the commission with written notice, because "compensation has been paid" within the reasonable signification of those closing words of section 84, as heretofore held by this court. *Industrial Commission vs. Lockard,* 89 Colo. 428, 3 P. (2d) 416; *Royal Indemnity Co. vs. Industrial Commission,* 88 Colo. 113, 293 Pac. 342; *Industrial Commssion vs. Globe Indemnity Co.,* 74 Colo. 52, 218 Pac. 910. Some of the amici curiae, conceding the force and effect of this line of our decisions,

ask us to overrule these cases. We know of no good or sufficient reason why we should do so.

The order of the referee, adopted verbatim by the commission, also contains a finding which undertakes to say that the medical plan contract is the thing entitling an employee, by reason of his payment of the regular medical assessment, to medical attention in case of compensable injuries. This was error. Section 51 of the act expressly prohibits the adoption of any medical plan "which relieves the employer from the burden of assuming and paying for any part of the medical, surgical and hospital services and supplies herein above required." C. L. 1921, Sec. 4425. A correct reading of the company's medical plan contract shows that this statutory provision was respected, as appears also from the company's answers on the medical questionnaire submitted by the commission. If an injury is compensable, the duty of the employer to provide medical and kindred relief at his own expense is absolute. It cannot be made to depend upon any requirement of payment of medical assessments by the employee. Such a requirement, in case of compensable injuries, would be unlawful.

The services and supplies furnished here were clearly furnished, in a case of verbally reported compensable injury, under the express authority, and under the express requirement, conferred upon the company physician by the contract which the company had voluntarily entered into. The company's employees, including the claimant, occupy the position of beneficiaries under that contract.

It follows that the commission erred when it said in its findings; "* * * said statute of limitations is not waived by the respondent employer or insurance carrier having furnished medical attention, for the reason that the medical treatment furnished to this claimant was by reason of the medical plan above referred to, for a disability not accidentally sustained or connected with his employment."

Some of the amici curiae earnestly contend that in any event the company ought not to be deprived of a hearing on the merits merely because it did not offer evidence thereon, but virtually limited its defense to setting up the bar of section 84.

Procedure under the Workmen's Compensation Act is intended to be speedy and effective. Its summary nature is emphasized throughout the act. Parties are expected to introduce all their evidence at the appointed hearing. On that evidence, so introduced, the Industrial Commission is required to decide. In determining whether the commission has done so in a particular case, a district court and this court must apply the recognized rules and principles of law. Where, as here, all the evidence supports the claim, because no evidence has been introduced to the contrary and no impeachment has taken place, the conclusion necessarily drawn by the law from the evidence must be enforced. Therefore the commission ought here to have found that the injury of the claimant, prompt notice whereof was proved to have been given to the company's superintendent, was compensable, for no other finding would be possible upon this evidence. It ought further to have found that the medical and other services which were required to be—and, according to all the evidence, actually were—given to the claimant, as required by the statute and in compliance with the express terms of the contract between the employer company and the company doctor, constituted compensation within the meaning of the statutory provision whereby the bar of the limitation statute "shall not apply to any claimant to whom compensation has been paid." These are the only findings possible under the evidence. The district court, in view of the record herein, ought to have sent the case back to the commission with directions to make these inescapable findings, but also with directions first to hold a further hearing solely on the issue of how much compensation should be awarded, and to make, on the evidence there taken, a proper award of compensation to the claimant.

The order of the commission and the judgment of the district court are reversed, and the case remanded to the district court, which will enter judgment with the aforesaid directions, returning the commission's record to that body for proceedings in conformity with this opinion.

Judgment reversed with directions.

MR. JUSTICE CAMPBELL, MR. JUSTICE BURKE and MR. JUSTICE HOLLAND dissent.

No. 13,910

Black Diamond Fuel Co. v. Frank.

On Petition for Rehearing.

MR. JUSTICE BOUCK, dissenting:

My views are well expressed by Mr. Justice Hilliard's dissenting opinion, in which I concur. I think the judgment of the district court should be affirmed in toto.*

*Note. When the majority opinion was announced herein, the mention of Mr. Justice Burke's partial dissent was inadvertently omitted. This error has now been rectified by the notation of his concurrence in Mr. Justice Young's opinion. Justices Burke, Hilliard, Bouck, and Young therefore concur in holding that the issue as to the statute of limitations has heretofore been disposed of. That issue is consequently withindrawn from the Industrial Commission's consideration.

1. In Colorado the principle expressed by the words "the law of the case" is neither new nor obsolete. It was imbedded here in early territorial days, and has been uniformly preserved and enforced ever since by this court, as well as by the first and the second Court of Appeals. I desire to cite and quote from a few of the authorities.

Nearly half a century ago this court, in the case of *Lee vs. Stahl* (1889), 13 Colo. 174, 177, 22 Pac. 436, 437, expressed itself as follows:

> "The former opinion in this case should now be regarded as 'the law of the case,' at least in this court, so far as it is applicable to the matters assigned for error on this appeal. We would not feel warranted in departing from it in determining the rights of the parties to this action. When the law governing a case has been once declared by the opinion of an appellate court on a direct appeal or writ of error, such opinion, on the retrial of the same case, upon the same state of facts, is higher authority than the rule of *stare decisis;* it is generally regarded as *res judicata*, so far as the particular action is concerned. * * * See opinion of Mr. Justice Belford in Mining Co. vs. Bank, 2 Colo. 266."

The opinion of Mr. Justice Belford referred to with approval in the foregoing passage says:

> "The rule is pretty well established among respectable courts, that an appellate tribunal will never reverse itself in the same cause. The reason for the rule is that the court below is bound to respect the views of the supervisory court, and if this latter court were allowed to change its views with every trial of the cause, there could be no end to litigation. The district judge would be liable to have his action reversed simply because he obeyed a direction made by his superiors, and for whose ideas he unfortunately entertained some little respect. It is quite as important that there should be some stability attendant upon judicial decisions as it is that they should be right."
>
> Union Mining Co. vs. Rocky Mountain Nat. B'k. (1873), 2 Colo. 248, 265.

In the case of *Davidson vs. Dallas*, 15 Cal. 75, which was also cited with approval in *Lee vs. Stahl, supra,* the Supreme Court of California (then consisting of three judges, one of whom was Chief Justice Field, later a distinguished justice of the United States Supreme Court) used the following clear language (at page 82):

> "The latter portion of that (former) decision (in *Davidson vs. Dallas,* 8 Cal. 227) is in abrogation of one of the plainest principles of law, and if this case was a new one, I would not hesitate to overrule it. But legal rules deprive us of the power to do so. The decision having been made in this case, it has become the law of the case, and it is not now the subject of revision.
>
> "The question was very fully argued and considered by the Supreme Court of the United States, in the case of *The Washington Bridge Company vs. Stewart, et al.* (3 Howard, 413); and although in that case the question raised on the record was the important one of jurisdiction, it was, notwithstanding, held that the previous decision of the Court in the same case, was conclusive of the rights of the parties, and not 'revisable.' (Citing numerous cases.)
>
> "Upon an appeal to this Court, the record of the case below is brought here, in order that the judgment of this Court may be obtained upon the matters assigned as errors. The case thus made, may be regarded as a new and distinct action. In theory, issue is joined in this Court upon the assignment of error made upon the record; and upon this issue the judgment of the Court must rest. After the issuance of the remittitur, it loses its jurisdiction over the case. The questions have passed, with the case, from its control. The judgment may be upon the whole matter, or upon a part; upon all the questions, or upon a single question. It may be upon a question of fact or a question of law. It may be final, in the sense of a definite determination of the matter, or it may be interlocutory; but it is final so far as the jurisdiction over it is concerned, or any power of control after the issuance of the mandate and the lapse of the term at which judgment is rendered. The power of the Court is exhausted. Mr. Justice Baldwin, in *ex parte* Sibbald (12 Peters, 488), says: 'Before we proceed to consider the matter presented by these petitions, we think it proper to state our settled opinion of the course which is prescribed by the law for this Court to take, after its final action upon a case brought within its appellate jurisdiction, as well as that which the Court whose final decree or judgment has been thus verified, ought to take. Appellate power is exercised over the proceedings of inferior Courts, not on those of the Appellate Court. The Supreme Court has no power to review its decisions, whether in a case at law or equity. A final decree in chancery is as conclusive as a judgment at law. (1 Wheat. 355) 6 Id. 113, 116. Both are conclusive of the rights of the parties thereby adjudicated.'
>
> "The decision of this Court, upon the assignment of errors, affirms the law on the matter thus presented for adjudication, and fixes the rights of the parties under the law. It affirms or reverses or modifies the judgment below. In the case of affirmance, there is

no question of the finality of the judgment. Why in the case of reversal? It is true the case is remanded—but how? to be retried in pursuance of the principles of law declared in the opinion. The directions of the opinion become a portion of the judgment. The opinion in this case remands the case for further proceedings, and those proceedings are to be in pursuance of the principles of the opinion. This is, in effect, if not directly, a mandate to the Court below to follow the directions of the opinion of this Court, on new trial; to administer the law as laid down in the opinion. The very matter here, then, in this case, in 8 Cal., was the validity of the third assignment of errors; and this question was expressly decided in favor of the then appellants, the present respondents. That judgment is, therefore, conclusive. We could not review it on motion for rehearing. It stands as the judgment of the highest court of record of the State; and it is not in our power now to re-try it on appeal, for, as Mr. Justice Baldwin says, we have no appellate power over our own judgment."

In *Table M. T. Co. vs. Stranahan*, 21 Cal. 548, another California case cited with approval in *Lee vs. Stahl*, supra, the Supreme Court of that state, again including Chief Justice Field among the three members of the court, spoke as follows:

"This case was before us * * * on appeal from a judgment in favor of the defendants. The judgment was reversed, and the cause remanded for a new trial, and the present appeal is from a judgment in favor of the plaintiff. The * * * facts, as elicited at the trial, are not materially different from those stated in our previous opinion. * * * The Court refused the following instruction: (here is set out a certain instruction.) This instruction was taken literally from the opinion delivered by us when the case was here before; and it is difficult for us to understand upon what ground the Court refused to give it. It is too late now to discuss the question of its correctness, for the matter has been adjudicated; and whatever doubts may exist in regard to the conclusion arrived at, it has become the law of the case. The counsel for the plaintiff contends that the point was not involved in the questions raised on the former appeal, and that so much of the language used as limits a location in the case put to the extent of the actual occupation, was mere *obiter*. It is true, perhaps, that an opinion upon the point was not essential to the decision of the case; but it was important for the purposes of a new trial; and it was in that view that we considered the matter and passed upon it. It was a matter necessarily involved in the issue to be tried, and the principle of *res judicata* is undoubtedly applicable to its determination."

The foregoing authorities have never been either directly or indirectly overruled or disapproved or questioned by this court or by the first or the second Court of Appeals, until the opinion of Mr. Justice Holland was handed down in the present case on June 29, 1936. The principle of "the law of the case" as announced in those authorities has been expressly followed and applied in many Colorado cases, even as late as 1931 or later. Witness, for example, the following:

Trinchera Co. vs. Trinchera Dist., 69 Colo. 170, 174, 300 Pac. 614, 615;
Smith vs. Windsor R. & C. Co., 88 Colo. 422, 424, 298 Pac. 646, 647;
Farmers Co. vs. Fulton Co., 81 Colo. 69, 70, 255 Pac. 449;
Zambakian vs. Leson, 79 Colo. 350, 354, 246 Pac. 268, 269;
Long vs. The People, 33 Colo. 159, 160, 79 Pac. 1132;
Tibbetts vs. Terrill, 26 Colo. App. 64, 68, 140 Pac. 936, 938;
German American Co. vs. Messenger, 25 Colo. App. 153, 158, 136 Pac. 478, 480;
First Nat. B'k vs. Manhattan L. Co., 21 Colo. App. 256, 257, 267, 120 Pac. 1112; (See court opinion 1112-1113 and Judge Walling's concurring opinion 1115.)
Board of Public Works vs. Denver Tel. Co., 16 Colo. App. 505, 506, 66 Pac. 676, 677.

In *Trinchera Co. vs. Trinchera Dist., supra*, Mr. Chief Justice Campbell, then an associate justice, expressed the opinion of this court as follows (89 Colo. at page 173):

"In 2 R. C. L., beginning on page 223, is a discussion under the head: 'Successive Appeals—The Law of the Case.' At section 191 it is said: 'The general rule as to the law of the case applies with regard to questions as to the sufficiency of the evidence to prove a fact in issue, and when the case comes up for review a second time and the evidence is substantially the same, the former decision is conclusive. * * * When the evidence presented upon the second appeal (or review) is materially different from that previously passed upon, the decision on the prior appeal is not conclusive. There must, however, be a material change in the evidence; additional evidence which is merely cumulative will not take the case out of the rule and constitute a material change, where evidence of the same class and character on the former appeal was held insufficient to prove the fact in controversy.' The language thus quoted is directly pertinent here. The evidence produced by petitioner here at the second hearing below was not materially different from that produced at the first hearing."

In the present case, "the evidence produced * * * at the second hearing below" not only "was not materially different from that produced at the first hearing" as to whether the payment of compensation prevented the claim from being barred by the statute of limitations; *but the evidence on the particular issue was not changed in any respect whatever.*

By the dissents of Justices Burke, Hilliard, Bouck and Young herein, this court now declares that its decision in 96 Colo. has settled the issue of the statute of limitations in favor of the claimant Frank. In other words, the district court judgment now before us (and incidentally the corresponding award by the Industrial Commission) is in that respect affirmed. So far, so good.

2. It is difficult to see, however, why this court makes a proper application of the principle of "the law of the case" to one part of the opinion in 96 Colo. and not to all of it. By virtue of that principle, as laid down by the authorities and fortified by sound reasoning, we ought to have approved also the directions we there gave relative to further proceedings before the Industrial Commission. Had we consistently applied the aforesaid principle we would not now unmake, as the majority opinion does, a substantial part of the decision made in 96 Colo. Our directions were reasonably plain and called for the taking of evidence by the commission (1) *in relation to the issue of what disability (if any) had actually resulted from the accident to Frank, and (2) in relation to the issue of how much compensation should be awarded if such disability did result from the accident.*

These directions were conscientiously followed, as "the law of the case" would normally require. Further evidence was accordingly taken. The attorney for plaintiff in error affirmatively assisted the commission in properly interpreting the directions, even against the contentions of the attorney for defendants in error; and the plaintiff in error's position was sustained throughout by the commission.

When all the evidence had been presented, the commission's referee made an award of compensation, which the commission duly adopted. The plaintiff in error complains of the award by certain assignments of error which in no way assail the conclusiveness of the decision in 96 Colo. Errors are assigned solely on the alleged lack of sufficiency of findings and of evidence to prove the issues italicized above. But this court obviously assumes such sufficiency, for the point is not mentioned in the majority opinion. It is fair to say that the evidence, at most, was conflicting, and that the commission was within its rights in resolving the evidence as it did.

The judgment should, I think, have been affirmed as a whole. In view of the ability, industry and zeal evinced by counsel, and the care and thought bestowed by the referee and the commission, in connection with the last hearing, it is not likely, and it is not intimated, that any serious omission of evidence occurred there on either side. If I am correct in this, the result will naturally and probably be that on substantially the same evidence the commission will come to the same conclusion as before and make its award in harmony therewith. I regret that in the present state of the record the court has deemed a duplication of procedure necessary herein.

LONDON GUARANTEE AND ACCIDENT COMPANY LTD., et al., vs. ALBERT COFFEEN.

96 Colo. 375

I. C. 69535 **42 P. (2nd) 998** **Index No. 203**

YOUNG, Justice.

The London Guarantee and Accident Company, Limited, and the O. P. Baur Confectionery Company, corporations, were plaintiffs in error and will be herein respectively designated as the insurer and the employer. Albert A. Coffeen and the Industrial Commission of Colorado are the defendants in error and will be herein mentioned as the claimant or employee, and the commission.

The claimant was employed as a night watchman. During the course of his employment he was assaulted by two robbers who struck him over the head with an iron bar, dragged him down concrete steps into the basement by his feet, tied him up with baling wire, kicked him in the face, threatened to throw him in the furnace, stuffed a handkerchief in his mouth and shut him in the toilet, where he was found twenty-five minutes later when the officers came upon the scene. As a result of this treatment his scalp was cut above the left eye, and on the back of his head; his skull was fractured on the left side, and he was badly bruised about the eyes and head. Tests at the hospital disclosed that his spinal fluid contained blood. He suffered severe nervous shock. The injuries were inflicted on March 19, 1931. Claimant was confined in the hospital for four weeks and returned to work May 11, 1931, compensation being paid him up to that time on an admission of liability.

On July 1, 1931, claimant went to the doctor who had cared for him in the hospital, for additional treatment, at which time it was discovered that he was suffering from diabetes. On September 29, 1932, more than a year and six months after the accident, claimant filed a petition to reopen the case, alleging that he had some permanent disability and was entitled to more compensation. From the date of filing the petition to reopen, a period of nearly two years passed during which claimant was treated and repeatedly examined, before findings and award were made on August 7, 1934. The findings and award of the commission were as follows: "That claimant was injured in an accident arising out of and in the course of his employment on March 19th, 1931, and

left work as a result thereof that same date. That his injuries consisted of contusions of the head and bruises of the entire body. That his temporary total disability terminated on May 11th, 1931. His average weekly wages were $23.10. His age is 58 years with his expectation of life 15.39 years. The Commission now finds from the evidence that the condition from which claimant is now suffering and particularly his diabetic condition is the result of the injury sustained on March 19th, 1931, permanently disabling him to the extent of 60% as a working unit." Such findings were modified by a later finding that the claimant's age was sixty, instead of fifty-eight, but otherwise the findings stood. On suit filed in the district court, the foregoing findings and award were sustained. The insurer and the employer bring the case here for review.

The assignments of error as set forth by the insurer and the employer in their brief are grouped under the two following general propositions: "(1) The Commission acted in excess of its powers in granting compensation for permanent partial disability in that it is not established by the manifest weight of evidence that such disability proximately resulted from the accident. (2) The findings of Fact made by the Commission do not support its award."

Five physicians of good standing examined the claimant and all testified in the case. One was the surgeon who attended the claimant at the time of his injury. One was called in consultation at the time of the injury and later made a written report to the commission. One was selected by the insurer, and two others were appointed by the Commisson. All of these doctors agreed that the claimant at the time of the hearing was suffering from diabetes, which manifests itself by a sugar content in the urine. This condition was first discovered by the doctor who treated claimant at the hospital when the latter went to him for further treatment on July 1, 1931, nearly two months after he had returned to work. The same doctor had not found any sugar present on examination made while claimant was in the hospital. The principal controversy was whether the diabetic condition was or could be of traumatic origin. Three physicians were of the opinion that it was not; one was of the opinion that it was of such origin, and one was of the opinion, that regardless of the diabetic condition, claimant was suffering effects directly attributable to the injuries sustained.

Claimant had been steadily employed for thirty-nine years prior to his injury and had been strong and able bodied. The evidence disclosed that after the accident, he had a weakness in one of his arms; was unable to balance himself; had sustained a loss of taste and smell, and exhibited general physical weakness. One of the doctors, who was of the opinion that the diabetic condition was not of traumatic origin, and that the ailments of which complaint was made were caused by the diabetes, arteriosclerosis, bad tonsils and bad teeth, stated, however, that some of these effects were such as sometimes follow a serious head injury.

The statute on which the first assignment of error is based is section 4452, Compiled Laws of 1921, amended by section 11, chapter 186, Session Laws, 1929, and which, so far as material here, read as follows: "In determining *permanent partial disability*, the commission shall ascertain in terms of percentage the extent of *general permanent disability* which the accident has caused, taking into consideration *not only the manifest weight of evidence*, but the general physical condition and mental training, ability, former employment, and education of the injured employe."

The contention of the insurer and the employer is that the words in the statute "taking into consideration not only the manifest weight of evidence" lays down a requirement as to the quantum of proof in cases involving permanent partial disability, which is greater than the proof required where other matters are in issue before the Commission, namely, that permanent partial disability must be proved by the manifest weight of the evidence, which they state in their brief means, "by proof which puts the matter beyond question of doubt," and again that " 'Manifest weight of evidence' means even more than proof beyond a reasonable doubt." They say further: "We recognize, of course, that this proposition is in conflict with the rule repeatedly announced by this court in compensation cases that if the findings and award of the Commission are supported by any competent evidence they cannot be disturbed by the courts on review. But in no case where this rule has been invoked or applied, has the peculiar provisions of Section 78 been involved."

The question is thus squarely presented whether under the section of the statute quoted, permanent partial disability and the percentage of general permanent disability resulting therefrom requires a greater quantum of proof than issues that are to be determined under other sections of the Compensation Act. No reason has been suggested why a different rule should obtain in such a case, but the insurer contends that the statute lays down a different rule. In our opinion the statute is not susceptible of such construction.

We think that the statute means that *permanent partial disability* shall be translated into or expressed in terms of *general permanent disability* and the percentage of such general disability fixed. It is obvious that a shortened limb constitutes permanent partial disability. It may cut down the effective use of the limb twenty-five per cent, but this is expressing the injury, not in terms of "general permanent disability," but restating it in terms of partial disability, for the complete loss of the limb would be only partial disability. The percentage of "general permanent disability" is not the same for all individuals who may suffer the same injury. A man who sits at a bench and works with his hands obviously is not disabled as a working unit by a shortened leg to the same extent as one who performs messenger duties around the plant.

A man engaged for years as messenger in a plant, whose education is such that he can do only work of similar character, suffers more "general permanent disability" from a shortened leg, than a man whose ordinary duties are that of an accountant, but who is temporarily and while injured doing work that requires the use of his legs. Examples might be multiplied; but from those here given, it is clear that rather than laying down a rule as to the quantum of proof of which the claimant must bear the burden, the statute intends to set forth the factors that the commission shall consider in translating what may be an obvious or manifest "partial permanent disability" into terms of "General permanent disability."

"The manifest weight of evidence" is merely one of the factors to be considered along with the "general physical condition and mental training, ability, former employment and education of the injured employee." As so used, what does "manifest weight of the evidence" mean? Counsel in their brief devote much space to the meaning of the word "manifest." The cases do not add anything to the definition quoted from Webster's New International Dictionary: "Evident to the senses, esp. to the sight; apparent, distinctly perceived, hence, obvious to the understanding; evident to the mind; not obscure or hidden. "Syn.—Open, clear, visible, unmistakable, indubitable, indisputable, evident, self-evident."

It is helpful to ask and answer the question, In the proof of what fact is the weight of evidence to be manifest? Certainly not in the proof of general permanent disability, nor of the percentage of general permanent disability; for other factors, namely general physical condition, mental training, ability, former employment and education of the injured employee, are to be considered by the commission, that is, weighed as evidence along with the factor of the "manifest weight of evidence" in proof of some fact or facts.

In our opinion the actual physical disability or injury that is manifest, apparent, evident to the mind, and clear to the commission, after the weighing of the evidence of it, and determining the nature of such actual disability from the preponderance thereof, is the "manifest weight of evidence" to which reference is made in the statute.

Counsel for the insurer and the employer contend there is much significance in the fact that the words "taking into consideration the manifest weight of the evidence" were inserted in the statute by the 1929 amendment. We agree with this contention; and we agree that they must be given whatever meaning was intended by the legislature, irrespective of the consequences. Section 6517, C. L. 1921, states the statutory rule in the construction of acts of the legislature, laid down by the legislature itself. It provides: "In the construction of all statutes the following rules shall be observed, unless such construction shall be manifestly inconsistent with the intent of the legislature, or repugnant to the context of the same statute; that is to say: First—All words and phrases shall be understood and construed according to the approved and common usage of the language."

We hold, that if the commission determines from a preponderance of the evidence that a partial permanent disability has been sustained, that fact then may be said to be manifest for the purpose of considering it as one factor entering into the determination of the percentage of general permanent disability. Certainly such construction is not repugnant to, but on the contrary is consistent with the constructions we have placed on other portions of the act in defining the quantum of proof required of the claimant to establish other injuries and consequent disability. *Employers Mutual Ins. Co. v. Industrial Commission*, 83 Colo. 315, 265 Pac. 99.

The second assignment of error, namely, that the findings do not support the award, is without merit. The principal dispute on the hearings, as shown by the whole record, was not whether the claimant was suffering from disabilities, but whether they were proximately caused by the accident, or by a diabetic condition that was not itself superinduced by the accident. The findings are clearly to the effect that the diabetic condition was caused by the accident and that the claimant was permanently disabled to the extent of 60 per cent of his efficiency as a working unit. There was competent evidence that he was so disabled from 50 per cent to 100 per cent and the findings of a 60 per cent disability is supported by the evidence. The findings are sufficient. While they are such as fact finding boards, made up of laymen, may be expected to make, they are not by any means to be considered as a model of what such findings should be. If more care were exercised in making findings, the work, not only of this court, but of the district courts, would be materially lessened and the interests of claimants, employers and insurers would be promoted.

The judgment of the district court is affirmed.

MR. CHIEF JUSTICE BUTLER and MR. JUSTICE BURKE concurring.

A. DANIELSON, et al., vs. INDUSTRIAL COMMISSION OF COLORADO and HILMA A. NESS.

96 Colo. 522

I. C. 82643 **44 P. (2nd) 1011** **Index No. 204**

BUTLER, Chief Justice.

While in the employ of A. Danielson and Son, Richard A. Ness sustained an injury arising out of and in the course of his employment. He died as a result of that injury. His widow, Hilma, was awarded compensation. The only controversy was, and is, over the construction to be given to Section 4421,

Compiled Laws, as amended by Session Laws of 1919, ch. 186, Sec. 2, p. 648. It provides as follows:

"The average weekly wage of the injured employe shall be taken as the basis upon which to compute benefits and shall be determined as follows: * * *

"(b) The total amount earned by the injured or killed employe in the twelve months immediately preceding the accident shall be computed, which sum shall be divided by fifty-two, and the result thus ascertained shall be considered as the average weekly wage of said injured or deceased employe, for the purpose of computing the benefits provided by this Act, except as hereinafter provided.

"(c) Provided, however, that in any case where the injured employe has been ill, and unable to work in consequence of such illness, or has been in business for himself during the twelve (12) months immediately preceding the accident, his average weekly earnings shall be computed by dividing the total amount earned during such twelve (12) months by the sum representing the difference between fifty-two (52) and the number of weeks during which such employe was so ill or in business for himself."

Ness was a painting contractor. For some reason satisfactory to him, he worked for the Danielsons for wages a few days each week during three calendar weeks in February, March and May, 1934. In one week he worked three days and earned $19.80; in another he worked four days and earned $26.40; in another he worked three days and earned $13.20, making a total of $59.40, wages earned during the twelve months immediately preceding the accident. At all times during that twelve months, except when he worked for the Danielsons, he was in business for himself as a painting contractor. Five days of six hours each constituted a working week. The Commission added the number of days Ness worked during the three calendar weeks, making a total of ten days, and held that he worked two weeks, and that the average weekly wage was one-half of $59.40, or $29.70, and computed the award on that basis.

The Danielsons and the insurance carrier contend that the statute does not provide for fractions of a week, and therefore that $59.40 is to be taken as the wages earned during three weeks, making the average weekly wage one-third of $59.40, or $19.80. As we have seen, paragraph (c) of section 4421 provides that the average weekly earnings shall be computed by dividing the total amount earned during the twelve months by the sum representing the difference between fifty-two and the number of weeks during which such employe was in business for himself. During each of the three calendar weeks in question Ness was in business for himself several days; hence, if we apply the rule contended for by the Danielsons and the insurance carrier, we would be obliged to hold that Ness was engaged in business for himself during fifty-two weeks, which, of course, would be absurd. The fact is that during each of the three calendar weeks in question he was in business for himself part of the time, making a total of five days during the three calendar weeks, and worked for wages part of the time, making a total of five days during the three calendar weeks. While for some, perhaps for most, purposes a week means a calendar week, extending from midnight Saturday until midnight the following Saturday (In re Tyson, 13 Colo. 482, 22 Pac. 810; Mora v. People, 19 Colo. 255, 35 Pac. 179), it does not mean that for all purposes. For example, if a man, hired at so much a week, commences work at the beginning of the working day on Wednesday and continues during all the working days until the end of the working day on Tuesday of the next calendar week, the money he earns would be one week's wage, not two weeks' wages.

To adopt the construction contended for would lead to unreasonable and unjust results, and such a construction should not be adopted where, as in this case, it can be avoided without doing violence to the language of the statute. Karoly v. Industrial Commission, 65 Colo. 239, 243, 176 Pac. 284. A court, of course, has no power to read into a statute a provision that does not exist (Colorado Fuel and Iron Co. v. Industrial Commission, 88 Colo. 573, 298 Pac. 955); but the result at which we arrive requires no disregard of that rule. The act is highly remedial and beneficent in purpose, and should be liberally construed so as to accomplish its evident intent and purpose. *Central Surety and Ins. Corporation v. Industrial Commission*, 84 Colo. 481, 271 Pac. 617; *Industrial Commission v. Johnson*, 64 Colo. 461, 172 Pac. 422; *Employers' Mutual Ins. Co. v. Industrial Commission*, 65 Colo. 283, 176 Pac. 314. Giving the statute what we believe to be a fair and reasonable construction, we hold as follows: During the twelve months immediately preceding the accident Ness was in business for himself forty-nine weeks plus five days, in all fifty weeks. The total amount of wages earned during that twelve months, $59.40, should be divided by two, the difference between 52 and 50, the number of weeks during which Ness was in business for himself. That makes $29.70, the average weekly wage, the basis upon which to compute benefits to which the claimant is entitled. In holding $29.70 to be the average weekly wage, the Commission did not err. It follows that the District Court committed no error in affirming the award of the Commission.

The judgment is affirmed.

MR. JUSTICE BURKE and MR. JUSTICE YOUNG concur.

YORDANNA EVANOFF vs. INDUSTRIAL COMMISSION OF COLORADO, et al.

96 Colo. 550.

I. C. 62960 **45 P. (2nd) 688** **Index No. 205**

HILLIARD, Justice.

A proceeding under the Workmen's Compensation Act. December 4, 1929, as the result of an accident arising out and in the course of his employment, John Evanoff was instantly killed; October 13, 1934, notice of claim of benefits was filed in behalf of his widow, plaintiff in error. Her claim was rejected and she assigns error.

The adverse ruling, of which she complains, was based on the bar of the statute of limitations (S. L. 1923, c. 201, Sec. 15, amending C. L. 1921, Sec. 4458), the applicable part of which reads: "The right to compensation and benefits, as provided by this act, shall be barred unless within six months after the injury, or within one year after death resulting therefrom, a notice claiming compensation shall be filed with the Commission. This limitation shall not apply to any claimant to whom compensation has been paid."

Clearly, dates alone considered, the claim was filed too late. It is asserted, however, that since a doctor under contract with the employer made an examination of the body of the deceased, and the insuring company paid the expenses of the burial, the last sentence of the quoted provision controls. *Royal Indemnity Company v. Industrial Commission*, 88 Colo. 113, 293 Pac. 342, and *Frank v. Industrial Commission*, —— Colo. ——, —— P. (2d) ——, are cited. We cannot think the doctrine of those cases is pertinent. In each instance the claimant there made claim in his own behalf, and was absolved from the result of belated filing because of payment, or its equivalent, made to him. This claimant has not been paid anything, nor has there been other recognition of her claim. The exception to the limitation, which is her reliance, applies "to any claimant to whom compensation has been paid."

When, in the light of the facts, the commission and trial court, in turn, came to consider the express words of the limitation statute, each found the exception inapplicable to claimant's situation. The point was rightly resolved. Let the judgment be affirmed.

MR. CHIEF JUSTICE BUTLER and MR. JUSTICE CAMPBELL concur.

UNITED STATES FIDELITY AND GUARANTY COMPANY, et al., vs. INDUSTRIAL COMMISSION OF COLORADO and MRS. MARY YUENGER.

96 Colo. 571

I. C. 81691 **45 P. (2nd) 895** **Index No. 206**

YOUNG, Justice.

The claimant, widow of Chris Yuenger, deceased, was awarded death benefits by the Industrial Commission, which award was sustained by the district court. The defendants, Colorado National Bank of Denver, as employer, and the United States Fidelity and Guaranty Company, as insurer, bring the case to this court on writ of error.

The assignments of error may be considered under two heads: First. That under chapter 177, Session Laws, 1931, section 1, the commission is without authority to set aside the findings of the referee unless it takes additional testimony or has a hearing de novo. Second. That there is no evidence to sustain the findings and award to claimant.

At the conclusion of the testimony the referee made his summary order, as he is authorized to do under section 4470, C. L. 1921, denying any compensation. Subsequently the claimant filed a petition asking the commission to review the order of its referee as provided by chapter 177 Session Laws, 1931, section 1. On a review, the commission did not take or order the taking of additional testimony as chapter 177, supra, gives it discretion to do. It made its findings on the record alone, reversed the order of the referee denying compensation, and awarded compensation as a death benefit to the claimant, widow of deceased.

Respondents urge that in reversing the award of the referee without first exercising its discretion to take or ordering the taking of additional testimony, the commission exceeded its authority. They very succinctly state their contention, that if it be held that the findings of the commission are binding on the district court and on this court, that "we have the anomalous situation of the Commission's factual finding being conclusive on all the courts of the state when the Commission is not any differently apprised of the facts than are the courts, and certainly are less experienced in the matter of applying the law to the facts disclosed by the cold record." Respondents point out that Section 4471, C. L. 1921, provides as follows: "Upon the filing of any such petition the commission shall review the entire record of proceedings in said cause and in its discretion may take or order the taking of additional testimony *and shall either affirm the findings and award of the referee* or *may enter a new finding and award, affirming* or *reversing the finding* or *award of the referee in whole or in part.*" That section of the statute as amended by chapter 177, Session Laws, 1931, provides for a petition to review the summary order of the referee and provides further that if the referee shall not amend or modify the order, he shall refer the entire case to the commission and "the commission shall thereupon review the entire record in said case, and, in its

discretion, may take or order the taking of additional testimony, and shall make its findings of fact and enter its award thereon." Respondents contend that the omission of the italicized portion of Section 4471, supra, when that section was amended in 1931, indicates the intention of the legislature to prevent the commission from making findings and an award contrary to the award made by the summary order of the referee without taking additional testimony. In our opinion the omission of such words in the amendment does not deprive the commission of that power. The statute, as amended, provides for a review by the commission of the order entered by its referee and makes it the duty of the commission to review the entire record in the case. After reviewing the record the statute leaves it to the discretion of the commission as to whether it will take or order the taking of additional testimony. This matter being discretionary, it follows that additional testimony may or may not be taken. The remaining portion of the statute provides that the commission *shall* make its findings of fact and enter its award thereon. Where there is an appeal from the referee's order, the making of findings and an award thereon is obligatory on the commission. Otherwise such an appeal would be but an idle gesture. If the taking of additional testimony is discretionary, then such findings and award of necessity will be based on the record, if the commission exercises its discretion and does not take any additional testimony. In brief, if the commission must make an award under such circumstances, and cannot do so on the record, but must take additional testimony, then the taking of additional testimony is not discretionary, a conclusion that would make the two provisions of the statute inconsistent with each other. That the legislature intended the commission should be a fact finding body whose conclusions on disputed testimony should be binding on the courts of review is apparent from section 4477, C. L. 1921, which sets forth the only three grounds upon which awards may be set aside by the district court, namely: "(a) That the commission acted without or in excess of its powers; (b) That the finding, order or award was procured by fraud; (c) That the findings of fact by the commission do not support the order or award."

The cause comes to this court on writ of error and we can review only what the district court had a right to determine. What constitutes evidence is a question of law. Under the act, the district court therefore, and on review, this court, may examine the record to determine whether or not there is anything therein constituting evidence to support the findings of the commission. If there is no evidence in support of the propositions that must be established by a party in order to prevail, then the commission acted in excess of its powers in finding for such party, for the commission is authorized under the law to make an award of compensation only where the necessary prerequisites are established by evidence. From the statutory limitations as to the grounds on which the courts may review the commission's award, it is apparent that even in a case where the commission has never seen the witnesses, it was the legislative intent that the commission's findings of fact nevertheless should be binding on the district court and, therefore binding on this court. While apparently the question has not heretofore been raised in the precise form in which it arises in this case, a long line of decisions of this court holds that the commission is a fact finding body and that its findings are binding on this court. *Passini v. Industrial Commission*, 64 Colo. 349, 171 Pac. 369; *Weaver v. Industrial Commission*, 72 Colo. 79, 209 Pac. 642; *Rogers v. Industrial Commission*, 94 Colo. 56, 28 P. (2d) 343; *Empire Zinc Co. v. Industrial Commission*, 94 Colo. 98, 28 P. (2d) 337; *Poole v. Industrial Commission*, 94 Colo. 163, 28 P. (2d) 809; *Hayden Brothers v. Industrial Commission*, 94 Colo. 211, 29 P. (2d) 637; *Central Surety Co. v. Industrial Commission*, 94 Colo. 341, 30 P. (2d) 253; *Boulder Valley Coal v. Shipka*, 94 Colo. 394, 30 P. (2d) 852; *Jabot v. Industrial Commission*, 94 Colo. 424, 30 P. (2d) 871; *Card Iron Works v. Radovich*, 94 Colo. 426, 30 P. (2d) 1108; *Allen v. Gettler*, 94 Colo. 528, 30 P. (2d) 1117.

Having disposed of the first contention of the respondents, it remains only to determine whether there is evidence to support the commission's findings.

There are three questions involved in every workmen's compensation case: (a) Was the death due to an accident? (b) Did the accident occur in the course of the employment? (c) Did the accident arise out of the employment? If there is evidence in the record supporting an affirmative answer to these three questions, then there is evidence to support the commission's findings.

Deceased was employed by defendant bank as a watchman in a large office building. A number of negro janitors were employed in the building. Deceased was the head watchman with no authority to supervise the work of the janitors, but he did have authority and it was his duty to see that all employees were out of the building within a reasonable time after their work was completed; to stop any disturbance or disorder that might arise among the employees or others who might be in the building; and to put out of the building employes or other persons who might be creating a disturbance. As to the ordinary work about the building, the janitors were in charge after five o'clock, but if anything out of the ordinary arose requiring action, the deceased was in charge. In the words of Mr. Roberts, the assistant cashier of defendant bank, deceased was "responsible for the entire interior of the bank, to see that those reporting out at five o'clock did so in the usual way, giving him the time they were going out; to see that all the doors were locked, to see that reports were made regularly to the A. D. T. and maintain order, and see that nothing unusual transpired in the bank."

Between five and six o'clock one of the negro porters, Jacqueline by name, left the building and bought some tobacco, a pint of whiskey and a pint of gin,

returning to the building after being absent about ten minutes. Before Jacqueline left the bank he took at least two drinks, and by his own testimony whatever drinks he took consumed practically a half of one of the pints, whether the bottle or gin or the bottle of whiskey does not appear. About 7:30, and after his work was completed, Jacqueline came up from the basement. He was very talkative, and while he himself denies it, there is testimony from which it might be concluded that he left the building and was gone about ten minutes before returning. Mrs Scott, the elevator pilot, noticed that he had been drinking. Another witness testified that when Jacqueline came back through the side entrance it seemed as though he were moving himself along the wall with one hand, and this witness said that he thought to himself: "That fellow has a nice jag." There is ample evidence to sustain the finding that Jacqueline was in an intoxicated condition.

It is further disclosed by the evidence that Yuenger said to Jacqueline, "You are not going to drive that car to Englewood, are you?" And that Jacqueline replied: "That is just what I am going to do, and furthermore, don't you ever say I was down there (referring to the basement) asleep." There was some argument between Yuenger and Jacqueline as to whether Jacqueline had been asleep or not. While the evidence is conflicting as to whether, following this altercation, Jacqueline first struck deceased or deceased first kicked Jacqueline, there is evidence, which, if believed by the commission —as we must assume it was—justifies the finding that Jacqueline first struck deceased.

It appears from the record that when Yuenger was struck he became violently enraged and began kicking at Jacqueline. Another negro janitor then took hold of Jacqueline and pushed him toward the door during which time Yuenger got his gun from the desk. This he was prevented from using by another employee who held his arm until Jacqueline was outside. Later deceased's glasses were picked up from the floor and various buttons were found which tends to show that the scuffle was rather a strenuous one. Almost as soon as Jacqueline had gone out through the door Yuenger fell to the floor dead.

The autopsy findings show that deceased was suffering from advanced arterio-sclerosis of both coronary arteries, which are the arteries supplying blood to the heart muscle itself, and from chronic fibrous myocarditis. Both coronary arteries were nearly closed.

The medical testimony was to the effect that where a person has a heart condition, such as was disclosed by the autopsy finding in this case, "anything such as anger or emotion which increases the heart rate, increases the demand on the blood supply from the heart and produces sudden death under these physical conditions." That any exercise, such as "running upstairs, lifting heavy objects, running after a street car, in fact any emotion or anger, fighting, and so forth," might have caused death; also, that deceased probably would not have died at the time he did, but for the excitement that occurred; that both physical exertion and mental excitement put an extra strain on the heart which might result in the very thing that happened in this case; that to cause death in such a case it is usually necessary that some sort of aggravation occur, something to put more than an ordinary strain on the heart; that it need not be very much, a very slight strain may be sufficient to cause death. One of the doctors, when asked whether he had formed an opinion as to what if anything accelerated Mr. Yuenger's death, replied: "Principally the emotion, the exertion, superimposed upon an old heart condition." Again he stated: "Sudden heart failure was possible any moment given two conditions, first, an excessive strain, and, second, an emotion; probably with emotion as the most important," and "If there had been no sudden exertion or psychic stimulation, he might have been able to survive five or ten years." Another doctor stated that "he could have died sitting in a chair without any exertion," but when asked what effect strain or exertion has in a case of this kind, replied: "It might be an over-stimulation of the heart and cause sudden death," and in cases like this that it "may accelerate the danger." A third doctor testified that excitement, strain and exertion might bring about death to one suffering from chronic heart trouble such as that from which Yuenger was suffering. Another doctor testified that a spasm of the heart muscle might be produced by emotion, exertion or strain, and that such a spasm might close the coronary arteries in a case where there was present a condition such as here existed, and cause death.

We think the foregoing medical testimony was sufficient to sustain the finding of the commission that the decedent, considering his condition, so over-exerted himself that his death, which followed immediately thereafter, was directly and proximately caused by such overexertion. The exertion, as one doctor stated, would not have killed a normal individual, but deceased did not have normal resistance. The defendant bank had Yuenger in its service with *his* resistance to exertion and other forms of accident, not an individual with a resistance to exertion and other forms of accident denominated as a normal resistance. The important question here is, whether what occurred was over-exertion for *him* and whether such overexertion proximately caused *his* death. The Commission so found.

Can the occurrence—in view of the attending circumstances—which culminated in Yuenger's death, be classed as an accident as that word is used in the Workmen's Compensation Act? We have determined in this state that an accident is a result, the causes of which are unexpected and unusual or that it may be also an unexpected and unusual result from ordinary causes. In *Carroll v. Industrial Commission*, 69 Colo. 473, 195 Pac. 1097, we said: "Our statute uses the expressions, 'personal injury or death accidentally sustained,'

and 'injury proximately caused by accident,' in providing for what injuries or deaths compensation shall be allowed. By the term 'injury' is meant, not only an injury the means or cause of which is an accident, but also any injury which is itself an accident. The expressions above quoted are the equivalent of 'injury by accident,' which is frequently used in the decisions. The word 'by,' may mean 'through the means, act, or instrumentality of. 9 C. J. 1109. Therefore 'injury by accident' and 'injury caused by accident' are terms or expressions which can be used interchangeably. In a discussion of the former, it is said in 25 Harvard Law Review, 340:

" 'Since the case of Fenton v. Thorley, nothing more is required than that the harm that the plaintiff has sustained shall be unexpected. * * * It is enough that the causes, themselves known and usual, should produce a result which on a particular occasion is neither designed nor expected. The test as to whether an injury is unexpected and so if received on a single occasion occurs "by accident" is that the sufferer did not intend or expect that injury would on that particular occasion result from what he was doing.' " *Ellerman v. The Industrial Commission*, 73 Colo. 20, 213 Pac. 120; *Allen v. Gettler*, 94 Colo. 528, 30 P. (2d) 1117. If the causes shown by the evidence, exertion and excitement, were not out of the ordinary, the result was out of the ordinary and was unexpected and under rules we have laid down constituted an accident.

Did the accident occur in the course of employment and arise out of it? If some third party, for example another of the janitors, had been slapped by Jacqueline, and a scuffle had ensued between Jacqueline and the watchman while the latter was attempting to eject him from the building, there could be little question but that such an act of the watchman was within the scope of his employment, and if he had overexerted himself in ejecting the man, with the result which followed in this case, there could be no question but that the overexertion constituting an accident was within the scope of his employment. We can see no distinction between the assumed case and the one here under consideration where Jacqueline chose to start the disturbance by slapping the watchman himself. It constituted a disorder or disturbance the quieting of which was within the scope of the duties of the watchman. In other words, what occurred arose out of and in the course of deceased's employment.

We therefore hold that the evidence is sufficient to support the finding of the commission that the deceased came to his death from overexertion; that the overexertion was the proximate cause of death, and that under the facts disclosed by the record it constituted an accident arising out of and in the course of his employment.

The judgment of the district court is affirmed.

MR. CHIEF JUSTICE BUTLER and MR. JUSTICE BURKE concurring.

KATHRYNE McBRIDE vs. INDUSTRIAL COMMISSION OF COLORADO, et al.

97 Colo. 166

I. C. 69416 **49 P. (2nd) 386** **Index No. 207**

HOLLAND, Justice.

On February 27, 1931, Herschell McBride, a mechanic in a tire shop in Sterling, Colorado, sustained an injury in the course of his employment. He applied for compensation through the Industrial Commission, and in October, 1932, was awarded the sum of $3,640, for permanent partial disability, to be paid in weekly installments, which were paid from October, 1932, until his death, July 18, 1933. In November, 1931, he married Kathryne McBride, who is plaintiff in error, and who was living with him at the time of his death. February 9, 1933, Sheila McBride, a child, was born and she is the other plaintiff in error.

Kathryne McBride, the wife, on her own behalf and that of her minor child, filed a claim for the unpaid portion of the sum theretofore awarded to her husband. This claim was denied by the referee, the Industrial Commission and the district court, and on the judgment of the district court error is assigned.

In this opinion, Herschell McBride will be designated as the deceased; plaintiff in error Kathryne McBride, as the claimant; and reference will be made to defendants in error, as the commission and insurer, respectively.

There is no dispute concerning the facts as above mentioned. It is apparent, and is conceded, that the referee, the commission and the court in denying the claim, relied upon Section 9, Chapter 201, Session Laws of 1923, amendatory of Section 57, Chapter 210, Session Laws of 1919, which, so far as is material in this case, is as follows:

"The question as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the injured employe and the right to death benefits shall become fixed as of said date irrespective of any subsequent change in conditions and such death benefits shall be directly payable to the dependent or dependents entitled thereto or to such person *legally entitled thereto* as the Commission may designate."

Counsel for the commission and the insurer, ably contend, that under this statute, the claimant, having married the employe subsequent to the date of the accident, was not a dependent, and not entitled to compensation. Counsel for claimant insist that the matter is not to be determined solely by the provisions of the statute above quoted, and that other provisions of the

Workmen's Compensation Act must be considered, especially section 52, chapter 210, Session Laws of 1919, which is as follows:

"For the purposes of this act the following described persons shall be conclusively presumed to be wholly dependent:

"(a) Wife, unless it be shown that she was voluntarily separated and living apart from the husband at the time of his injury *or death* and was not dependent in whole or in part on him for support.

"(b) Minor children of the deceased under the age of eighteen years. The term 'minor child' shall include posthumous children or a child legally adopted prior to the injury."

Claimant's counsel further contend that the dependency of a wife is thereby determined as a matter of law, when there is a showing that she was living with her husband at the time of his death, and was dependent upon him for support; and that there is a conclusive presumption that she is a dependent for all purposes of the compensation act. With the last contention we agree, and adhere to the former decisions of this court, which so determine. *London Guarantee and Accident Co. v. Industrial Commission*, 78 Colo. 478, 242 Pac. 680; *Vaughn v. Industrial Com.*, 79 Colo. 257, 245 Pac. 712.

To give full import to the purposes of the Workmen's Compensation Act as originally enacted and later amended, all portions thereof should be read together and harmonized if possible. It unquestionably is clear that certain persons, under prescribed conditions, shall be considered dependents, and in that connection, as it relates to other purposes of the act, section 1, chapter 174, Session Laws, 1931, which was enacted subsequently to section 57 of the 1923 Act above quoted, is applicable to this case and is as follows:

"Children eighteen years of age or over, husband, mother, father, grandmother, grandfather, sister, brother or grandchild, who were wholly or partially supported by the deceased employe at the time of his death and for a reasonable period of time immediately prior thereto, shall be considered his actual dependents. If such dependents be a son, grandson, or brother eighteen years of age or over, a husband, father or grandfather, to be entitled to compensation, they must prove that they were incapable of or actually disabled from earning their own living during the said time; Provided, however, if said incapacity or disability is temporary only, compensation shall be paid only during the period of such temporary incapacity or disability."

This later section fixes the condition upon which certain persons are to be considered dependent. It determines their dependency as of the time of the employe's death, and does so, regardless of the time of the accident. It then follows, that this latter section, to which reference will be made as amended section 53, is in conflict with amended section 57, hereinbefore quoted, if said amended section 57 is to be construed as fixing *all* dependencies as of the time of the accident. We do not so construe it. Injury and death are not always coincident. This being true, conditions constituting dependency may change during the intervening period, as is often the case, and it must follow, that the *extent* of the right to death benefits cannot always be fixed as of the date of the accident. The wording of the amended section 57, presupposes a *question* to be determined. That question is "who" and "the extent". Section 52, Session Laws, 1919, and amended section 53, herein quoted, leave no question to be determined. Dependency and extent are fixed as a matter of law. "For all purposes of the act" the legislature said the wife is conclusively presumed to be wholly dependent on the husband if living with him at the time of his injury or his death. Had the legislature intended to exclude a post-injury wife, words were just as available then as now, to so specifically state.

Counsel for the commission and insurer, rely upon the words "irrespective of any subsequent change in conditions" as determinative of the rights of the claimant here who became a wife subsequent to the accident, and deal with the matter as a subsequent change of the condition of the injured employe. The quoted words can only refer to dependents, because the legislature was considering only dependents in fixing the right to a death benefit. The injured employe must first have died. If applied as counsel contends for, the word "irrespective" has no fixed meaning, because amended section 58, immediately following, enumerates "subsequent" happenings that either terminate or change the benefits.

Many cases from other states are cited and excerpts from the opinions freely quoted, but we do not find them helpful or controlling, because the entire Workmen's Compensation Act of Colorado, as now amended, has no counterpart in any of those states; however a similarity in some parts, which are discussed in some of the cited cases, tend only to confuse. Reference is made to, and reliance had upon, the case of *Dahlquist v. Nevada Industrial Com.*, 46 Nev. 107, 206 Pac. 197. In that case the claimant was a common-law wife *before* the injury and a wife by ceremonial marriage the day after the injury. All that is said by the court in its opinion, with reference to the ceremonial marriage is obiter dicta, because the court found, that marriage before the injury, had been established under common law. Such parts of section 26 of the Nevada Compensation Act, which are similar to the Colorado statute as are pertinent, are as follows: "The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employe: 1. A wife upon a husband whom she has not voluntarily abandoned *at the time of the injury*," and another section of the Nevada statute is like our amended section 57. Note the distinction between this statute and section 52 of the Colorado act, which we repeat: "(a) Wife, unless it be shown that she was voluntarily separated and living apart from the husband at the time of his injury or *death*." The original Workmen's Compensation Act of

Colorado, enacted in 1915, did not contain the words "or death" and it is significant, that four years later, for some good purpose, these words found their way into our present law. In the absence of these words, the commission's contentions would have more weight.

As a further indication that the conclusions—favorable to the wife—herein reached are not legally correct, but righteous, and unharmful to insurer, we find that the claimant herein, as a post-injury spouse, was recognized as a dependent by the insurer, as appears from the following quotation from a letter to the commission written by the insurer, at a time when deceased was making application for a lump sum settlement.

"I note from the application that his wife is expecting a child within the next few weeks and that he is requesting that we approve lump sum for the expense, to which we offer no objection and are heartily in accord with the granting of this portion of the lump sum settlement. I feel that $500.00 at this time should be sufficient to take care of this need and then at a later date, he is desirous of requesting a further lump sum, and the same is for his best interests, we will then offer no objections." And same was allowed and paid.

Moreover, in this connection, the commission finally determined the full liability of the insurer by a lump sum award, in the amount of $3,640. That became a vested right. The extent of the injury was fixed, as much so as by judgment. This right would survive. It is to be distinguished from compensation, claimed as a death benefit, which cannot be paid to legal representatives, because barred by the amendment of section 57, Session Laws of 1919. In either event, the insurer here, cannot escape payment of the unpaid portion, as attempted here; it rightfully should go to the post-injury spouse, as a dependent or in the alternative, she could recover as a person legally entitled thereto.

The claimant here, had received support as a dependent out of deceased's compensation, which was the equivalent of wages; was recognized as a bona fide dependent by the insurer; and now the groping about for a reason to deny her what she would have rightfully received, had deceased lived a sufficient length of time, is equivalent to insisting that a strict interpretation is to be placed upon these seemingly conflicting provisions of the statute, which is not in accord with the beneficent purposes of the act; and to further say, that workmen, after an injury, should cease to be natural, social, companionate personalities.

The judgment is reversed with directions to remand the case to the commission for entry of its award to claimant for the unpaid portion of the lump sum award.

MR. JUSTICE HILLIARD and MR. JUSTICE BOUCK dissent.

No. 13,661.

McBride v. Industrial Commission.

MR. JUSTICE HILLIARD dissenting

I cannot agree with the court's interpretation of the section of the Workmen's Compensation statute here involved.

Section 52 prescribes who shall be conclusively presumed to be *wholly* dependent, which is the only office of the section. So far as the wife is concerned it reads: "For the purpose of this Act the following persons shall be conclusively presumed to be wholly dependent:

"(a) Wife, unless it be shown that she was voluntarily separated and living apart from the husband at the time of his injury or death and was not dependent in whole or in part on him for support." It fixes the degree of dependency, not the identity of dependents. The question as to the latter is answered by section 57, and not elsewhere in the act. That section reads: "The question as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the injured employe and the right to death benefits shall become fixed as of said date irrespective of any subsequent change in conditions and such death benefits shall be directly payable to the dependent or dependents entitled thereto or to such person legally entitled thereto as the Commission may designate." There is nothing in the act that in any manner conflicts with the unmistakable language of section 57. The court gravely calls attention to the amendment, in 1931, of section 53 of the act, as if the legislature had amended section 57. Had there been legislative purpose to change section 57, power was at hand. And section 53 was amended only to the extent of adding "grandchild" and "grandson" to the list of those who may be dependents. The term "wife" was not in the original section 53, nor is it in the amended section. Still, the court insists, section 53, which never had and does not now have application to a wife, is, because of the 1931 amendment to include grandchild and grandson, an amendment of section 57 and thereby changes the status of a wife.

The court says that "Had the legislature intended to exclude a post-injury wife, words were available," etc. That is not the question. Without the statute there would be no dependents, in the sense of the compensation act. Necessarily, therefore, a wife seeking to qualify as a dependent must show that she is included, not that the legislature failed to exclude her.

Finally, the court says that because, subsequent to the marriage, there had been a lump sum award, "it is to be distinguished from compensation," and can be recovered by the wife "as a person legally entitled thereto." Perhaps so. I am not advised. Suffice to say this proceeding was not of that nature.

LONDON GUARANTEE AND ACCIDENT COMPANY, LTD. vs. FAY W. McCOY, et al.

97 Colo. 13

I. C. 79244 **45 P. (2nd) 900** **Index No. 208**

BURKE, Justice.

Plaintiffs in error are hereinafter referred to as the London Company and the Liberty Company respectively; defendant in error as Mrs. McCoy, Arthur, and the Commission respectively; and Mrs. McCoy's deceased husband, Arthur H. McCoy, as McCoy.

This is a Workmen's Compensation case. McCoy met his death while in the employ of the Liberty Company, whose insurance was carried by the London Company. Mrs. McCoy, for herself and Arthur, filed with the Commission her claim for compensation. The claim was allowed. Plaintiffs in error thereupon took the cause to the district court which affirmed the award of the Commission and entered judgment accordingly. To review that judgment this writ is prosecuted. Eleven assignments present, in various ways, the simple question, Was the accident which caused McCoy's death one *arising out of his* employment? Two cross assignments present the contention that the action in the district court was not commenced within the time limited by statute.

For an understanding of our conclusion a brief statement of facts is essential. McCoy was a sales agent of the Liberty Company, in which capacity he was in Pueblo August 26, 1933. His employer had made a deal which necessitated the bringing of an automobile bus from Pueblo to Denver. He was directed to arrange for this. In doing so he found it necessary to get in touch with one Mitchell, whom he knew as "Dick" but whose true name, under which he appeared in the telephone directory, was Thomas E. Hence McCoy went to the home of one Decino, father in law of Mitchell. McCoy not only knew Decino but had dealt with him and they were on friendly terms. Arriving there he found Decino outside the house and greeted him but received no answer. He then inquired of Decino's young daughter, there present, if he might use the telephone. She answered in the affirmative and gave him directions. He accordingly entered the house and repeated his request to two other daughters of Decino whom he found there, also asking for Mitchell's telephone number. Having received this he entered another room, called the Mitchell home, learned that Mitchell was absent and, while talking with his wife concerning her husband's transfer of the bus to Denver, was apparently stabbed to death by Decino. The latter, who had been in the insane asylum for one month in the early part of 1932 and three months in the latter part of that year and early in 1933, and voluntarily returned there after McCoy's death, had apparently suffered a sudden return of his insane delusions, procured a butcher knife from an icebox, entered the room and struck down McCoy, then chased his daughters and his wife, with murderous intent, until they escaped from him.

The Commission made the following "findings and award."

"The decedent on August 26, 1933, while in the employ of the Liberty Trucks and Parts Company, went to the residence of one Nicholas Decino, to telephone a man by the name of Mitchell, regarding a bus that was to be brought to Denver next day. He secured permission to use the telephone and while telephoning, was stabbed to death by Decino, who was at that time a paroled inmate of the State Insane Asylum.

"The referee finds that the death was due to an accident arising out of and in course of decedent's employment."

The statute involved is sec. 4389, p. 1235, C. L. 1921. It specifies the facts essential to recovery in compensation cases. It is conceded that all these were here present save that the accident which caused McCoy's death was one "arising out of * * * his employment."

In a case of murder on the highway we held the accident need not be one which "might have been anticipated," but that it was sufficient if "after the injury, it can be seen that the injury was incurred because of the employment."

Industrial Commission v. Pueblo Auto Co., 71 Colo. 424, 207 Pac. 479.
Industrial Commission v. Hunter, 73 Colo. 226, 214 Pac. 393.

We have also held, in a "lightning" case, that "when one in the course of his employment is reasonably required to be at a particular place at a particular time and there meets with an accident, although one which any other person then and there present would have met with irrespective of his employment, that accident is one 'arising out of' the employment of the person so injured."

Aetna Life Ins. Co. v. Industrial Commission, 81 Colo. 233, 236; 254 Pac. 995.

More recently we said:

"Unless the reason for the attack is shown by the evidence to be in some way peculiar to the employment, then it must be assumed to have been foreign thereto. Before claimant can secure the benefits of the Workmen's Compensation Act, he must trace the injury to a connection with the employment as a contributing proximate cause."

Rocky Mountain Fuel Co. v. Kruzic, 94 Colo. 398, 401, 30 Pac. (2d) 868. At first glance this would seem not only to preclude recovery here but also to overrule the Aetna Life case, *supra*. Neither conclusion is, however, justified.

It must be noted that in the Kruzic case we also said that it "presents its own peculiar facts and seems to be singularly lacking in evidence that apparently could have been produced"; also that, for all the record disclosed, "this (the wounding of Kruzic) could have happened to him at any other time or place." In other words it was a mere coincidence that Kruzic's assailant happened to find him at his place of employment. The assault had no connection with that employment and would apparently have been made wherever the parties chanced to meet.

In the instant case we have an accident which we probably can not say "might have been anticipated," but which, in retrospect, we readily discern "was incurred because of the employment;" thus clearly bringing it within the Pueblo and Hunter cases, *supra*. McCoy was "reasonably required to be at a particular place at a particular time," i. e., the Decino place at the time he phoned. He there met with this accident, doubtless "one which any other person then and there present would have met with irrespective of his employment." Yet such an accident "is one 'arising out of' the employment." Thus bringing it clearly within the Aetna Life case, *supra*. Here was the Decino home where duty called McCoy. It was reasonable that he should go there in the discharge of that duty at that particular time. There lurked, unanticipated, a mortal danger, an impending accident, i. e., an insane man, with a deadly weapon accessible, about to be driven by a sudden delusion into a murderous assault upon anyone there present. The record does not permit the assumption that the accident could have happened "at any other time or place." It was confined to the identical place and almost the identical moment of the presence of McCoy in the discharge of the duties of his employment. It is as though, in a like discharge, he had walked under a falling timber, or upon a spot where a lightning bolt fell.

Counsel for plaintiffs in error call attention to the fact that our quotation, *supra*, from the Aetna Life case is from a concurring opinion. It is so entitled in the report but not so in fact. All seven of the Justices participated, and but one dissented. Five of the others, at least, approved the rule stated in the "concurring" opinion, which thus became, equally with the other, the opinion of the Court.

Numerous authorities from other jurisdictions are cited and discussed at length in the 244 pages of briefs with which counsel, in their able and exhaustive presentation, have favored us. We do not discuss them because firmly convinced that our own settle the point. We do not doubt the correctness of the conclusions in the causes herein cited. Under them this accident arose out of McCoy's employment. Such has become the law in this jurisdiction, and as observed in the Aetna Life case, *supra*, "the remedy, if any, to be applied, rests with the Legislature."

Having thus disposed of this cause on the merits contrary to the contention of plaintiffs in error it is immaterial whether they filed their cause in the district court in apt time, hence we need not notice the cross assignments.

The judgment is affirmed.

MR. CHIEF JUSTICE BUTLER and MR. JUSTICE YOUNG concur.

UNITED STATES FIDELITY AND GUARANTY COMPANY, et al., vs. INDUSTRIAL COMMISSION OF COLORADO and JOHN A. FLEMING.

97 Colo. 102

I. C. 73063 **46 P. (2nd) 752** **Index No. 209**

HOLLAND, Justice.

John A Fleming, while employed as a hard rock miner, received injuries, the results of two accidents, one on May 2, 1925, the other on December 29, 1931. The first occurred while he was employed by Oston Company and the United Gold Mines Company, which were insured in the United States Fidelity and Guaranty Company. These are plaintiffs in error, and the companies may sometimes herein be referred to as "first employers." The second accident occurred while Fleming was in the employ of the Cresson Gold Mining and Milling Company, insured by State Compensation Insurance Fund, both are defendants in error, the company being herein designated as "second employer." Fleming will be referred to as claimant.

This is a workmen's compensation case involving consolidated claims for the two accidents. A final award for $2,120, for injuries sustained in the first accident was entered against first employers, and an award for $2,640, was given against second employer, for the second accident, both being affirmed by the district court. First employers assign error.

On May 2, 1925, claimant, in the course of his employment, suffered a fractured skull and, upon recovery, returned to work June 1, 1925. He received compensation for the period he was not at work, and his hospital and doctor bills were paid. June 15, 1925, a referee of the Industrial Commission forwarded to claimant, application blanks for hearing, if requested, on permanent disability, if any, resulting from the accident, and advising him that unless he replied within ten days, the commission would assume that he did not claim any permanent disability and would close its file. He made no reply. After resuming work, claimant put in full time at the same and increased wages until December 29, 1931, when the second accident occurred while he was working for the second employer. Falling a distance of about forty feet, he landed on his head and shoulders, the fall resulting in a compression fracture of the eleventh dorsal vertebra, for which he filed claim for disability. During

the course of the hearing on this claim, his attorneys, by letter, made a claim for permanent disability alleged to have resulted from the first accident on May 2, 1925. This application was made September 25, 1933, more than eight years after the accident.

On January 30, 1934, a referee of the commission entered an order for compensation for temporary disability for the accident of December 29, 1931, for a period from January 9, 1932, to May 1, 1933, and for further compensation for permanent disability at the rate of $14.00 per week, from June 1, 1933, until the sum of $3,640, should be paid. This order was against the second employer and State Compensation Insurance Fund, and was confirmed by the commission July 5, 1934. On the same date, January 30, 1934, the referee made a finding that claimant sustained *no permanent* disability by reason of the accident of May 2, 1925.

June 25, 1934, plaintiffs in error the first employers and insurer, filed motion for dismissal of the claim against them, on the ground of failure to make claim for disability for more than eight years after May 2, 1925, the date of the first accident, and under section 4458, C. L. '21, which provides that any disability beginning more than five years from the date of the accident, shall be conclusively presumed not to be due to such accident; also on the six year statute of limitations, section 6392, C. L. '21, and further that the commission did not reopen the case on its own motion, but upon application of claimant's attorneys.

Based upon disabilities determined from a diagnosis made August 27, 1930, the Veterans' Bureau, made allowance to claimant of $12 per month, on a twenty-five per cent permanent and partial rating, for "tuberculosis, silicosis, skull fracture, no apparent residual pathology."

The commission found that claimant was partially and permanently disabled by the 1925 accident to the extent of forty-one and two-thirds per cent, and thirty-three and one-third per cent as a working unit, as a result of the second accident, December 29, 1931; that he was receiving government compensation for a twenty-five per cent disability, making total permanent disability of one hundred per cent.

In the findings and award of the commission, we find, with reference to the first accident the following language: "But the Commission can not find that he is permanently and totally disabled by reason of that accident, when the evidence shows that he worked for more than six years following the injury. However, considering the serious nature of the injury and the ensuing chain of circumstances, the Commission does find that the Claimant was partially disabled to the extent above mentioned."

In claimant's petition for review, is the following statement: "The referee has failed to consider the undisputed evidence that the claimant was able to do heavy manual labor up to December 29, 1931, and that he has ever since been and now is totally disabled from engaging in any gainful occupation."

Final award of the commission was entered August 11, 1934, which was affirmed by the district court, and the first employers, and insurer, assign error, grounds of which, were generally presented in their motion to dismiss the particular specification being that there is no evidence to support the finding against plaintiffs in error.

On this review we are concerned only with the award for permanent disability resulting from the first accident, of May 2, 1925. In the proceedings before the commission this claim was consolidated with the claim for disability from the second accident, which necessarily makes the record extensive and the labor of examination tedious. A review of the evidence would unduly prolong this opinion. We are unable to understand the calculations of disability percentages by the commission, and considering the wording of the findings and award heretofore set out, such findings must be declared to be conclusions, based upon possibilities and probabilities and not upon actualities. Necessarily we are dealing with the correctness of an award of compensation for disability, and disability, as that term is used in the Workmen's Compensation Act, means disability to work. *Employers' Mutual Insurance Co. v. Industrial Com.*, 70 Colo. 228, 199 Pac. 482.

As to the period for which disability in this case was claimed, and an award made; that is, between May 2, 1925, and December 29, 1931, claimant testified—and it is admitted and nowhere disputed—that he returned to work as a hard rock miner about June 1, 1925, and continued to work at the same and increased wages until the date of the second accident in December, 1931. This work was carried on by claimant, with no report or complaint of any disability except an occasional headache and some discomfort; however, it is apparent from the record, the effect of which is conclusive on claimant, that during this period, according to the records of the Veterans' Bureau, he was not a normal healthy individual. He was sufficiently aware of his rights to make claim for permanent disability, if any he had, because he did make claim for temporary disability, received compensation therefor, and was afforded opportunity by the referee to present his claim for permanent disability if any he had.

In view of the work history and the opportunities afforded to make claim in apt time, claimant's failure to do so now confronts him as laches under all the circumstances. The employer and insurer must be, and are, given protection in such cases, and are not required to compensate for possible disability concerning which they had no notice or opportunity to investigate. None of the physicians testifying in claimant's favor examined him prior to the second accident, and they were unable to definiteiy to attach claimant's disability, as found after the second accident, to the results of the first accident. The conjectures of physicians, pointing to an aftermath of the first accident, con-

sidered with claimant's testimony, the claim made, and the work history, presents an incompatible and discordant combination. It does not afford such evidence as will support the award, and when considered, is so weak that it falls within the class which is considered no evidence at all. To be compensable, disability must rest upon the actual impairment of claimant as a working unit; such impairment is not to be found during the period intervening between the two accidents. Justice and fairness will not permit an award for disability when none exists.

It is unnecessary to discuss the various steps of the proceedings since they lead us to the major question which we have herein considered and determined. The record and the evidence do not justify the award against plaintiffs in error, and their motion to dismiss the claim should have been sustained.

Judgment reversed.

MR. JUSTICE CAMPBELL and MR. JUSTICE BOUCK not participating.

INDUSTRIAL COMMISSION OF COLORADO, et al., vs. JOSEPH DORCHAK.
97 Colo. 142
I. C. 77433 **47 P. (2nd) 396** **Index No. 210**

YOUNG, Justice.

This is a proceeding under the Workmen's Compensation Act. The plaintiffs in error will be referred to in this opinion respectively as the commission, the employer and the insurance company, and the defendant in error will be designated as claimant.

On January 17, 1934, the commission by a supplemental award affirmed a former supplemental award of date December 22, 1933, denying compensation. The material part of the supplemental award of December 22, 1933, is as follows: "claimant was injured on September 3, 1932, while attempting to move a case containing one dozen quart bottles of milk. He slipped, and fell backwards to the pavement, the case striking his chest. He did not leave his employment until October 4, 1932. His injury was to his chest, servical region of the spine, and back of his head. On October 4, 1932, claimant became paralyzed and he has been permanently and totally disabled since that date. He filed his claim for compensation with this Commission on March 13, 1933. His average weekly wages were $15.34.

"The Commission finds from the evidence, that Claimant's condition is not the result of an accidental injury sustained on or about September 3, 1932, but that his said accident was the result of his then condition, which grew progressively worse until October 4, 1932.

"It is therefore ordered: That claimant's claim for compensation and medical benefits be, and the same is hereby denied."

On February 6, 1934, complaint was filed in the district court by the claimant, attacking the foregoing award of the commission and assigning as one of the grounds, that the Commission had not found the facts under one of the issues in the case, namely, whether claimant's condition at the time of the accident on September 3, 1932, was aggravated by the injury sustained on that date. There was evidence on the part of the claimant that he had worked continuously and that his health had been good. The medical evidence, the employer and the insurer claim, shows conclusively that claimant was afflicted with a multiple sclerosis, or creeping palsy, and that the paralysis which resulted on October 4, 1932, following the injury that he sustained, was caused by the multiple sclerosis and not by the injury.

Upon hearing in the district court the order made by the court so far as here material was as follows: "This cause having heretofore been taken under advisement at the conclusion of trial to court, and the court being now sufficiently advised in the premises, doth now find the issues herein in favor of the plaintiff and against the defendants. That the Industrial Commission should determine in view of claimant's condition prior to the accident whether or not the accident in which the claimant was injured aggravated the claimant's condition to such extent that he is or is not entitled to compensation under the Workmen's Compensation Act.

"This case is therefore remanded to the Industrial Commission of the State of Colorado with directions to re-open the above entitled cause for such other and further proceedings it may deem proper, and to amend its finding and award of December 22, 1933, in accordance with the views herein expressed by the court in its Opinion and Finding of Court entered on the 27th day of December, 1934." This order was entered pursuant to an opinion and finding of the trial court which appears in the files of the case, and is consistent with that opinion and finding.

On the entry of the foregoing order, the commission, the employer and the insurance company assign error, and the claimant assigns cross-errors, none of which, in the view we take of this cause, will it be necessary for us to consider.

It will be observed that the district court ordered the cause back to the commission for its determination as to whether the injury of which complaint is made aggravated a pre-existing diseased condition. In so doing, we think the trial court was acting clearly within its powers under section 4476, C. L. 1921, which is as follows: "If upon trial of such action it shall appear that all issues arising in such action have not theretofore been presented to the Commission in the petition filed as provided in this act, or that the Commission has not theretofore had an ample opportunity to hear and determine any

issues raised in such action, or has for any reason, not in fact heard and determined the issues raised, the court shall, before proceeding to render judgment, unless the parties to such action stipulated to the contrary, transmit to the Commission a full statement of such issue or issues not adequately considered, and shall stay further proceedings in such action until such issues are heard by the commission and returned to said court. Upon receipt of such statement, the Commission shall hear and consider the issues not theretofore heard and considered, and may alter, affirm, modify, amend or rescind its finding, order or award complained of in said action, and it shall report its action thereon to said court within a reasonable time after its receipt of the statement from the court. The court shall thereupon order such amendment or other proceeding as may be necessary to raise the issues as presented by such modification of the finding, order or award as may have been made by the commission upon the hearing, if any such modification has in fact been made, and shall thereupon proceed with the trial of such action."

In the trial of an ordinary suit at law, if the jury fails to make findings of fact on one or more issues involved in the case, unquestionably the court, with the jury before it, has the right to require a finding on all of the issues involved before entering a judgment. We think it was the purpose of the legislature in enacting section 4476, supra, to impose on the district court the duty of seeing that all of the issues involved in the case are determined by the commission—which stands in the relation of a jury to the district court—before the court passes upon the sufficiency of the evidence to sustain the finding and award, and before determining whether the commission has acted within or without its powers, or that the findings of fact by the commission do or do not support its order or award.

We are of the opinion that the order of the trial court, referring this matter back to the commission for determination on a specific issue, is not subject to review by this court. It was merely an interlocutory order. Whether such orders are proper or not, being merely interlocutory, this court will not review them until the district court has finally and fully exercised its power under the statute and has passed upon all of the issues that it deems are involved in the case. Until it has done so, there is no final judgment for this court to review. *Tavenor v. Royal Indemnity Co.*, 84 Colo. 521, 272 Pac. 3.

In view of the fact that proceedings under the Workmen's Compensation Act are more or less informal, and properly so—as such proceedings satisfactorily settle the great majority of cases—when a serious dispute arises, such that its settlement is sought in the district court, it is proper that the district court under section 4476, supra, exercise supervision over the fact finding body—the commission—to the extent of requiring that it pass on all issues properly in the case on the record. We have repeatedly held that the commission's finding as to facts under the issues is binding, both upon the district court and upon this court on review; but there being no formal pleadings before the commission, what issues are raised by the record which should be determined by the commission, is a question of law for the court. After the district court determines what the issues are, it may properly require, and indeed should require under the statute above set out, that the Commission as a fact finding body determine the facts under such issues. That the trial judge clearly recognized the function of the commission and his own duty in such cases is evidenced by his statement that "The court is not in any way attempting to disturb the findings of the Commission as far as it has gone, but it has not gone far enough. It should determine, in view of claimant's condition prior to the accident, whether or not the accident in which the claimant was injured aggravated the claimant's condition to such extent that he is or is not entitled to compensation under the Workmen's Compensation Act.

"This case is therefore remanded to the Industrial Commission of the State of Colorado with directions to re-open the above entitled cause for such other and further proceedings it may deem proper, and to amend its finding and award of December 22, 1933, in accordance with the views herein expressed."

Since the findings of fact by the Commission are binding both on the district court, and on this court on writ of error, if the district court exercises its function of determining on the record what issues are involved, and then requires that the commission make findings of fact on all such issues, the district court on the hearing and this court on review will have the necessary data from which to determine whether the action of the commission shall be affirmed or set aside under section 4477 of the Compiled Laws of 1921 fixing the grounds upon which an order or award of the commission may be set aside, namely: "(a) That the commission acted without or in excess of its power; * * * (c) That the findings of fact by the Commission do not support the order or award." If such procedure is followed the work of this court will be simplified and the interests of all parties to such actions will be expeditiously determined and fully protected. In this case the commission will now make a definite finding on the issue submitted to it by the district court which it will re-certify to the district court for final determination of the cause as presented on the completed record.

In view of the fact that the finding required by the district court must be made in this cause and in view of the great number of cases in which it is contended by the claimant or the issue is raised, that a preexisting diseased condition has been aggravated by an injury, we think it proper to observe that in such cases in order that the district court, and this court on review, may determine whether there is any evidence in support of the

commission's finding, the commission should determine and set out in its finding: (a) Whether there was a precxisting diseascd condition; (b) what that diseased condition was; and (c) whether it was aggravated by the occurrence shown in evidence and relied upon as an accidental injury. When the issue of aggravation of a preexisting diseased condition is raised, a determination of its existence and character is absolutely necessary to the formation of an intelligent conclusion as to whether there has been an aggravation of such condition. To refer to it, as in the findings in this case, as the claimant's "then condition," is to leave it doubtful (where there is any conflict in the evidence) what the commission had in mind; for claimant's "then condition" may have been one of health or of disease.

For the foregoing reasons the writ of error is dismissed and the cause remanded to the district court for further proceedings in accordance with the views herein expressed.

MR. CHIEF JUSTICE BUTLER and MR. JUSTICE BURKE concur.

CONSOLIDATED COAL AND COKE COMPANY, et al., vs. SAM M. TODOROFF and INDUSTRIAL COMMISSION OF COLORADO.

97 Colo. 125

I. C. 77415 **47 P. (2nd) 404** **Index No. 211**

HILLIARD, Justice.

A proceeding before the Industrial Commission. Claimant prevailed there and the district court affirmed the order. The employer and insurer company sue in error.

February 6, 1933, while in the course of employment by the coal company, claimant was accidentally injured, but continued to work until March 2, 1933. March 10, 1933, he filed notice and claim for compensation. Respondents contested the claim, and March 21, 1933, hearing was had before the commission's referee. April 8, 1933, the referee ordered payment of compensation for temporary total disability from March 13, 1933, to March 31, 1933, and made no award for permanent disability. May 15, 1933, claimant petitioned for review of the referee's order, and May 24, 1933, the commission adopted and affirmed the order of the referee. December 15, 1933, the commission, reciting that it had examined the file, ordered that a further hearing be held January 3, 1934. The hearing was held and January 17, 1934, the commission entered the following supplemental award: "That claimant was injured in an accident arising out of and in the course of his employment, February 6, 1933, but did not leave work until March 2, 1933, when he was dismissed because of reduction in force. His injury was to his left shin. His temporary total disability terminated on March 31, 1933, and the commission finds from the evidence that claimant has not sustained any permanent disability as a result of said accident, the condition from which he is now suffering being due to varicose veins, which existed prior to February 6, 1933." March 13, 1934, reciting that claimant's petition to reopen the case had been considered, the commission entered denial thereof. May 15, 1934, the commission ordered further hearing, which was held June 27, July 5 and July 13, 1934. July 24, 1934, the commission ordered that its order of January 17, 1934, be affirmed and approved as its final award. October 6, 1934, the commission ordered that a further hearing be held to determine whether there had been error, mistake, or change in condition. October 24, 1934, hearing was had, and January 9, 1935, the commission entered findings to the effect that by reason of his injury, claimant was temporarily and totally disabled from March 2, 1933, to December 9, 1933; that the injury aggravated a previous varicose condition suffered by claimant, and that his permanent disability was equivalent to fifty per cent of the left leg, at the ankle; that due to failure "to allow compensation for claimant's extended temporary disability and for permanent disability, due to aggravation of the claimant's pre-existing varicose condition," both the referee and commission had erred in previous awards. On these findings the commission awarded temporary total disability from March 13, 1933, to December 9, 1933 (instead of to March 31, 1933, as in the original award), and, for permanent disability, fifty-two weeks from December 9, 1933. January 22, 1935, respondents filed petition for review which the commission denied January 24, 1935. February 13, 1935, the action of the commission was appropriately challenged in the district court, where, as we have seen, there was affirmance of the commission's award.

Two points are urged: (1) That since, as said, the evidence does not support its findings that temporary disability from March 31, 1933, the limit originally fixed, obtained till December 9, 1933, and permanent disability for 52 weeks from December 9, 1933, originally denied, the commission acted without and in excess of its powers; (2) that the findings of the commission do not support its awards.

1. It appears that prior to claimant's injury he had been suffering from varicose veins in the injured leg, but that not until such injury, which seemingly aggravated his condition, was he unable to work. The original temporary award was based on a doctor's report that by relief from work, and treatment meanwhile, claimant's leg should return to its previous condition by April 1, 1933. The temporary award, as already noted, was to be effective from March 13, 1933, to March 31, 1933, conforming in extent to the doctor's report and the statute which provides that where disability lasts more than ten days from the time the injured employe leaves work, no

disability indemnity shall be allowed for the first ten days. C. L. 1931, Sec. 4444, subparagraph (b). December 9, 1933, a doctor reported that because of pain induced by the injury claimant was still unable to work, the injury evidently causing an ulceration made worse by varicosities. January 3, 1934, claimant testified that although he had tried to work since the injury, he had been unable to do so. We think the showing warranted the extended temporary disability found by the commission.

In the matter of permanent disability, we think there was sufficient new evidence to justify the commission's modified findings. The additional showing distinguishes the case from Rocky Mountain Fuel Co. vs. Sherratt, ... Colo., ... P. (2nd) ....., cited by plaintiffs in error, where without further showing, and at a late time, the commission made a finding contrary to its earlier solemn determination. The award on the permanent disability finding was made pursuant to statute. See Session Laws 1923, p. 742, Sec. 12, subparagraph (f), and Session Laws 1929, p. 655, Sec. 10, subparagraph (f), both passed in amendment of section 4447, C. L. 1921.

2. The claim that the awards are not supported by the findings we believe to be without merit.

Let the judgment be affirmed.

MR. CHIEF JUSTICE BUTLER and MR. JUSTICE CAMPBELL concur.

THE DENVER UNION TERMINAL RAILWAY COMPANY vs. INDUSTRIAL COMMISSION OF COLORADO and JOSEPH L. SAXE.

97 Colo. 129

I. C. 82760 **47 P. (2nd) 392** **Index No. 212**

HOLLAND, Justice.

This is a review of a judgment of the district court involving proceedings before the State Industrial Commission. The plaintiff in error, Denver Union Terminal Company, will be referred to as the terminal company; the defendants in error, as the commission and claimant.

While in the employ of the terminal company, claimant was engaged in moving interstate mail from one insterstate train to another by a terminal company truck at the Union Depot in Denver, and by a fall, was injured in the course of his employment. For this injury, he sought compensation through this proceeding before the commission. There is no dispute as to the nature or extent of the injury. The terminal company appeared, solely to deny the jurisdiction of the commission, and contended that the Federal Employers' Liability Act controls, to the exclusion of the state Workmen's Compensation Act and further that the case is exempted from operatiion of the state act by the Colorado statute of which section 4384, C. L. 1921, is as follows: "The provisions of this act shall not apply to common carriers engaged in interstate commerce nor to their employes."

On August 30, 1934, claimant filed his claim for compensation, and after appearance by all interested parties, a hearing was had before a referee of the Industrial Commission who made a finding to the effect that the commission had no jurisdiction over the terminal company, and denied the claim. Claimant petitioned for review and thereafter, on March 2, 1935, the Commission made findings of fact and awarded compensation to the claimant, holding that the commission had jurisdiction. This award was made final by a supplemental award dated March 7, 1935. This matter was then brought to the district court, which on April 1, 1935, entered its judgment affirming the final award of the commission, and the terminal company seeks a reversal by this review.

The terminal company is incorporated as a terminal railway company, empowered to acquire, own and maintain a union depot and terminal facilities for railroads for the reception and delivery of baggage, mail, express and passengers. For no profit, it operates, under a contract, a facility for six trunk line railroads as their only terminal. It owns the station, and tracks used by passenger trains entering and leaving the station, controls their operation on said tracks, sells tickets, transfers all baggage and mail between and from trains, and has sole control of all passengers boarding or leaving trains. It owns no railroad cars or locomotives, and does not, through its employes, actually handle the physical operation of the cars or locomotives of trains, but does own and physically operate tractors and trucks used for transporting mail and baggage to, from and between trains.

That the handling of United States mail across the country, is interstate commerce, seems well settled. *Zenz v. Industrial Accident Commission*, 176 Cal. 304, 168 Pac. 364; *Cleveland, C. C. & St. L. Ry. Co. v. Industrial Commission*, 294 Ill. 374, 128 N. E. 516; *Dewing v. New York Central Railroad Co.*, 281 Mass. 351, 183 N. E. 754. This includes all participation on its movement, and it follows, that the transfer of such mail from one train to another toward its further destination, is just as necessary as its carriage across the state boundary. It closes the gap in the course of its transmission. That claimant was so engaged is not questioned, and we find that as such employe, he was engaged in interstate commerce. But this alone does not satisfy the statutory exemption above quoted. Was he an employe of a common carrier, so engaged?

This depends, largely, upon the classification of the trunk line railroads, with which the terminal company was under contract, and whose agent it thereby became. Nothing to the contrary being shown, we assume that these railroads were common carriers, by railroad, as specified by the federal act. While not

deciding that this agency would constitute the terminal company a common carrier, by railroad, and that it would thereby fall within the federal act, to the exclusion of the state Industrial Act, it is sufficient, if it became a connecting common carrier, to deprive the commission of jurisdiction.

By its control of passengers and their baggage, while on its property, it was engaged in interstate transportation, by this essential part of the movement. It was the facility and agency relied upon by the railroad companies to complete their engagement, and for which they could be primarily liable for the acts of its agent. This is well stated in *United States vs. Brooklyn Terminal*, 249 U. S. 296, 39 Sup. Ct. 283;

"The service which it performs is distinctly public in character. * * * The fact that the railroad of the terminal is short does not prevent it from being a common carrier * * * nor does the fact that the thing which it undertakes to carry is contained only in cars furnished by the railroad companies with which it contracts. * * * True, the service is performed by the terminal under contracts with the railroad companies as agent for them and not on its own account. But a common carrier does not cease to be such merely because the services which it renders to the public are performed as agent for another."

The judgment is reversed.

MR. JUSTICE HILLIARD dissents.

MR. JUSTICE BOUCK not participating.

ARTHUR ROEDER, AS TRUSTEE OF THE COLORADO FUEL AND IRON COMPANY vs. INDUSTRIAL COMMISSION OF COLORADO and GEORGE J. HOFMAN.

97 Colo. 133

I. C. 79721 **46 P. (2nd) 898** **Index No. 213**

BURKE, Justice.

Plaintiff in error is hereinafter referred to as the Company, and defendants in error as the Commission and Hofman respectively.

This is a Workmen's Compensation case. The facts are not in dispute. Hofman, while employed by the Company, was injured in an accident arising out of and in the course of that employment. As a result thereof he was totally disabled from July 28 to December 6, 1933. He filed his claim with the Commission and was awarded compensation at $5.00 per week. The Company, claiming the rate should have been $1.67 per week took the cause to the district court which affirmed the award. To review the judgment entered accordingly the company prosecutes this writ. The amount here involved is small but the question presented, i. e., the correct interpretation of the statute, is important. As it stood at the date of the injury it reads:

> "In case of temporary disability of more than ten days' duration, the employe shall receive fifty per cent. (50%) of his average weekly wages so long as such disability is total, not to exceed a maximum of Fourteen Dollars ($14.00) per week, and not less than a minimum of Five Dollars ($5.00) per week unless the employe's wages shall be less than Five Dollars ($5.00) per week, in which event he shall receive compensation equal to his average weekly wages."
>
> Sec. 4445 C. L. 1921 as amended by Sec. 8 Chap. 186, P. 654 L. 1929.

Hofman's average weekly wage for the year preceding the injury was (owing to unemployment) $1.67, but at the time of the accident his *rate of pay* was $18.48 per week. The question presented is the proper interpretation of the word "wages" in that phrase of the statute reading "unless the employe's wages shall be less than Five Dollars ($5.00) per week," which clause we herein refer to as the "unless" clause. The Company says the word should be construed "average weekly wages," while the Commission and the court construed it as "Wages at the time of the accident." They thus held that Hofman's wages were not less than $5.00 per week, hence the "unless" clause was not applicable to him, and awarded him the minimum under the first portion of the statute.

In support of its contention the Company calls attention to sec. 4421 (b) C. L. 1921 as amended by sec. 2, chap. 186, p. 649, L. 1929, which gives the rule for determining "average weekly wages" under the Act, and which reads: (Sec. 47 (b).

> "The total amount earned by the injured or killed employe in the twelve months immediately preceding the accident shall be computed, which sum shall be divided by fifty-two, and the result thus ascertained shall be considered as the average weekly wage of said injured or deceased employe, for the purpose of computing the benefits provided by this Act, except as hereinafter provided."

In support of its contention the Commission calls attention to sec. 4421 (a), C. L. 1921, which defines the term "Wages" and reads: (Sec. 47 (a).

> "Whenever the term 'wages' is used it shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the accident * * *."

Both interpretations are supported by good reasons and both are open to serious objections. In practical application either will result in some inconsistencies. These however are legislative, not judicial, problems. The General Assembly has given us a rule of interpretation. It says where the word "wages" is used (and such is the term before us, not "weekly wages" and not "average

wages") it shall be construed to mean "*money rate* at which the services are recompense under the contract of hire in force *at the time of the accident.*" Here the *money rate*, under the contract in force *at the time of the accident* was $18.48 per week. This not being less than $5.00 the "unless" clause of the section has no application Hofman was therefore entitled to fifty per cent of his average weekly wage. That average was $1.67 and fifty per cent would be $0.835. But in such case the General Assembly has fixed a minimum of $5.00, the amount awarded by the Commission and approved by the court. We see no escape from the mandate.

The judgment is affirmed.

MR. JUSTICE CAMPBELL, acting Chief Justice and MR. JUSTICE YOUNG concur.

THE MOREY MERCANTILE COMPANY et al. vs. WILLIAM B. FLYNT and INDUSTRIAL COMMISSION OF COLORADO.

97 Colo. 163

I. C. 82709 **47 P. (2nd) 864** **Index No. 214**

BUTLER, Chief Justice.

This writ of error is sued out by The Morey Mercantile Company, the employer, and Royal Indemnity Company, the insurance carrier, to review a judgment of the District Court affirming an award by the Industrial Commission directing the payment of $100 to a doctor who attended William B. Flynt, an injured workman.

Flynt filed with the Industrial Commission a claim for compensation for injuries which he alleged were caused by an accident arising out of and in the course of his employment.

The Industrial Commission, affirming the findings of the referee, found that the claimant failed to establish accidental injury as defined by law. It also found that Doctor Bumpus, who attended the claimant, was justified in assuming, because of a letter written to him by the Insurance Carrier, that the treatment was authorized by the carrier. The commission ordered the employer and the insurance carrier to pay the doctor $100 for his services, and ordered "that the claim for compensation other than for Doctor Bumpus' bill, be denied, the claimant having failed to establish accidental injury as defined by law."

The title to the Workmen's Compensation Act is, "An Act to define and prescribe the relations between employer and employe and providing for compensation and benefits to employes and their dependents for *accidental* injury to or death of employes," *etc.* (Italics are ours.) Injuries that are not accidental are not within the scope of the act, and afford no basis for compensation under the act. We have held that medical expense paid for a claimant under the Workmen's Compensation Act is compensation within the meaning of the act. *Industrial Commission v. Globe Indemnity Co.*, 74 Colo. 52, 218 Pac. 910; *Industrial Commission vs. Lockard*, 89 Colo. 428, 3 Pac. (2d) 416. In the Globe case, *supra*, we said that an employer is required by the act to pay medical expense only in cases in which he would be charged with the duty of paying other compensation. And in *Employers' Mutual Ins. Co. v. Industrial Commission*, 89 Colo. 475, 479, 3 Pac. (2d) 1079, we said:

> "The purpose of the act is to cast upon the particular industry the burden resulting from *accidental* injuries sustained by its employes while performing duties arising out of and in the course of their employment. It was not intended to compensate employes for injuries or illness not due to their employment; or to pay benefits to their dependents when death results from such injuries or illness; or to pay the medical, hospital, funeral or other expenses incurred by reason of such injuries, illness or death."

A claim for medical services rendered to an injured employe at the instance of the employer or an insurance carrier, in cases where the injury is not caused by accident arising out of and in the course of employment, may be enforced in an independent action, but cannot be allowed in a proceeding under our Workmen's Compensation Act.

The judgment is reversed, and the cause is remanded with the direction to the District Court to set aside the award of the Industrial Commission.

MR. JUSTICE HILLIARD and MR. JUSTICE YOUNG concur.

THE INDEPENDENCE COFFEE AND SPICE COMPANY et al. vs. W. M. TAYLOR and INDUSTRIAL COMMISSION OF COLORADO.

97 Colo. 242

I. C. 31315 **48 P. (2nd) 798** **Index No. 215**

BOUCK, Justice.

This case arises under the Workmen's Compensation Act. An award of compensation having been made by the Industrial Commission, the employer company and its insurer brought an action in the District Court to set aside the award, and, that court having affirmed the award, they bring the judgment here for review.

The industrial accident upon which the claim was based occurred on March 17, 1924. The employe, W. M. Taylor, sustained a compensable injury, and the employer, the Independence Coffee and Spice Company, acknowledged its liability. Negotiations were had, and in addition to medical expenses a certain sum

was agreed upon by, and settlement made between, the employe and the insurer, a receipt being given to the latter by the former (we quote verbatim) "in full settlement of compensation," the Commission having duly approved the compromise without any formal hearing being had or findings made.

More than ten years after the accident, the claimant asked the Commission to reopen the case. A hearing was accordingly had, the notice thereof containing the following statement: "the purpose * * * is to determine whether or not claimant's present condition is the result of his accident; termination of temporary disability and degree of permanent disability."

It is apparent that the hearing of 1934 was purportedly held under the Commission's power to reopen a case of its own motion; it was therefore held, not in the course of the usual proceedings—when the controversy is still under the control of the parties—but ostensibly by virtue of section 110 of the act (C. L. 1921, sec. 4484). This is the only provision for such a long-delayed reopening. By its terms it cannot be applied except where there has been "error, mistake or a change in conditions." Evidence indicating any such error, mistake, or change in conditions within the meaning of section 110 is wholly lacking.

For one thing, the record shows that the temporary disability ceased before the employe had given the above mentioned receipt to the insurer. Moreover, the physician who in 1924 attended the claimant at the latter's instance did not then find any basis for permanent disability. The claimant himself testifies that he did not at the time know of any permanent disability, but his testimony proves that if permanent disability resulted it was known to him at or about the time of the compensation settlement, certainly before the medical services for which the insurer expressly assumed liability had been fully rendered by the claimant's physician, who permanently removed from Colorado as early as 1925.

It is significant that not the slightest suggestion of fraud is made in connection with the aforesaid receipt "in full."

What rights, then, legal or equitable, could the claimant here invoke?

The agreement of settlement was voluntarily reached and executed without proceeding to a hearing at which the evidence could have been taken with the customary facilities and safeguards for eliciting the then existing facts. More than a decade elapsed before an alleged permanent disability was brought to the attention of the Industrial Commission, though (as already stated) it is conceded by the claimant that if the permanent disability now asserted exists it was discovered almost immediately after the accident. Liberal as the Workmen's Compensation Act is, it was not intended thereby to permit a relitigation between an employer who has apparently in good faith been lulled into a settlement, on the one hand, and, on the other, an employe who, without assailing the employer's good faith in making such settlement, has kept silent concerning a condition that could have been investigated with the usual testimonial tests when the evidence was still fresh and available to all. Fairness to both sides requires that, under the facts and circumstances above stated, the original disposition of the claim by amicable settlement be not disturbed. The case of *London Co. vs. Sauer*, 92 Colo. 565, 22 P. (2d) 624, cited by the claimant can be distinguished because of the extraordinary situation there presented, a serious oversight having been committed, due to an affirmative error of the claimant, obviously shared by everyone there concerned. The case clearly fell within the category of "error, mistake or change in conditions" justifying the reopening of the case. We neither need nor desire to change the views therein expressed. It is sufficient to say that in the case at bar we cannot permit an obviously bona fide settlement to be overthrown by the mere expert opinions arrived at largely by deductions from such a case history as can at this late day be recounted by the claimant to physicians who, after ten years or more have passed since the accident, have only recently examined him for the first time.

A bona fide settlement is the equivalent of an award or judgment reached upon evidence. In the absence of proof that fraud was practiced or that a fundamental mistake occurred without the fault of the claimant, it is presumed that the facts upon which a compensation settlement is based were fully presented to each other by the contracting parties.

From the foregoing it seems clear that, in the circumstances here appearing, the settlement must be recognized as final between the parties; and furthermore that the indispensable requirement for reopening a case under section 110, on account of "error, mistake or a change in conditions," has not been met.

The judgment must therefore be reversed and the case remanded to the District Court with directions to return the record to the Industrial Commission and to instruct that body to set aside the award and dismiss the case.

In the light of our decision, it is not necessary to consider the contention of counsel for the plaintiffs in error that the claim herein is barred by one or more statutes of limitations.

Judgment reversed with directions.

INDUSTRIAL COMMISSION OF COLORADO et al vs. LUCY M. ULE.
97 Colo. 253
I. C. 78614 **48 P. (2nd) 803** **Index No. 216**

BUTLER, Chief Justice.

While John L. Ule was working for the City and County of Denver he sustained an injury that resulted in his death. His widow, a dependent, applied for compensation. The Industrial Commission disallowed her claim. The District Court vacated the award, and remanded the case to the Commission with direction to enter an award in favor of the claimant. The Commission, the City and County of Denver, and the State Compensation

Insurance Fund (the insurance carrier) are here seeking a reversal of the judgment.

The following facts are established by the findings of the Commission and by undisputed evidence, which we treat as findings of fact (Prouse vs. Industrial Commission, 69 Colo. 382, 194 Pac. 625; *Winteroth vs. Industrial Commission*, 93 Colo. 38, 22 Pac. (2d) 865):

John L. Ule was employed as a wood worker at the Denver Municipal airport. He worked principally in the "dope" shed, where a preparation, called by the witnesses "dope," and which, for the sake of brevity, we shall refer to by that name, was applied to the bodies and wings of airplanes by means of a spray gun. At times Ule assisted in applying the dope. His exposures to the "dope" were as follows: October and December, 1932, not more than five hours each month; November, none; January, February and April, about five hours each month; March, none; May, a very short job. His exposure during all those months did not exceed a total of twenty to twenty-five hours. At various times between January and May, 1933, Ule showed symptoms of "dope" poisoning, but it did not interfere with his work. On May 21, 22 and 23, Ule was subjected to an unusual and excessive exposure, two "dope" guns being employed and work on the airplane being pushed as rapidly as possible. On the evening of May 23, he became so ill from "dope" poisoning that he had to be assisted to a car. His lower limbs up to his knees became numb. He had to quit work on June 7. His disability continued until his death on January 1, 1934, which was the proximate result of the "dope" poisoning. Cases of airplane "dope" poisoning are rare and unusual, and "few cases and little about them are known to the medical profession." The only literature on the subject is contained in Bauer's Manual of Aviation Medicine and a pamphlet published by the United States Navy. Since May 23, 1933, there has been administered to employes at the municipal airport exposed to airplane "dope" three quarts of milk each day and a quantity of whiskey each evening to prevent poisoning. Prior to that date no such precaution was taken, nor were respirators or masks furnished to the employes, presumably because so little was known about the effects of exposure to the "dope" and serious results therefrom were not foreseen or expected by either the employer or Ule.

The Commission held, as a matter of law, that Ule's death was not due to accident as defined by law. In an action to vacate the award, the District Court held to the contrary.

We think the District Court was right. The death was not due to an occupational disease, as contended by the plaintiffs in error, but to accident.

An occupational disease is one "contracted in the usual and ordinary course of events, which from the common experience of humanity is known to be incident to a particular employment." *Industrial Commission vs. Roth*, 98 Ohio St. 34, 120 N. E. 172. It is one "normally peculiar to and gradually caused by the occupation." Dillingham's Case, 127 Me. 245, 142 Atl. 865. "One which is due wholly to causes and conditions which are normal and constantly present and characteristic of the particular occupation." Seattle Can Co. vs. Department of Labor and Industries, 147 Wash. 303, 265 Pac. 739.

There is nothing in the evidence to indicate that the serious disability suffered by Ule on May 23rd, which resulted in his death, was the natural and reasonably-to-be expected result of his employment; or that his disease was contracted in the usual course of events; or was one which from common experience was or is known to be incident to his employment; or one due wholly to causes and conditions which were normal and constantly present in his employment. Therefore, Ule did not die of an occupational disease.

The exposures to which Ule was subjected on May 21, 22 and 23, were unusual; the number of spray guns used on those days was double those previously used, and the emission of "dope" spray correspondingly increased. It produced effects that were not *intended, foreseen* or *expected*; hence it was an accident. Carroll vs. Industrial Commission, 69 Colo. 473, 195 Pac. 1097; Columbine Laundry Co. vs. Industrial Commission, 73 Colo. 397, 215 Pac. 870; United States Fidelity & Guaranty Co. vs. Industrial Commission, 76 Colo. 241, 230 Pac. 624; *Fidelity & C. Co. vs. Industrial Accident Commission*, 177 Cal. 614, 171 Pac. 429; *Johnson Oil Refining Co. vs. Guthrie*, 167 Okla. 83, 27 Pac. (2d) 814; *Barron vs. Texas Employers' Ins. Association*, (Tex.), 36 S. W. (2d) 464; *Adler vs. Interstate Power Co.*, 180 Minn. 192, 230 N. W. 486.

The fact that Ule had inhaled the "dope" spray in smaller quantities on previous occasions and had felt the effect thereof does not make the injury caused by the unusual and excessive inhalation on May 21, 22 and 23 any the less an accident. United States Fidelity and Guaranty Co., *supra*; Johnson Oil Refining Co. vs. Guthrie, *supra*; Barron vs. Texas Employers' Ins. Association. *supra; General American Tank Car Co. vs. Weirick*, 77 Ind. App. 242, 133 N. E. 391; *Industrial Commission vs. Palmer*, 126 Ohio St. 251, 165 N. E. 66.

Prouse vs. Industrial Commission, *supra*, is relied upon by the plaintiffs in error as controlling in this case and entitling them to a reversal of the judgment. The facts in that case are different in important particulars from those now before us. There, there was no unusual and excessive inhalation of bad air; the employe had been told by a doctor that he was working too hard in bad air and advised him to lay off, and it was held that the deleterious result was not unexpected; the employe died, not of bad air or poisonous gas, but of septicemia or pyaemia, "the time, place or manner of contracting which" was "not shown by the evidence." All of those circumstances are absent from the record in the present case.

The judgment is affirmed.

MR. JUSTICE HOLLAND and MR. JUSTICE YOUNG concur.

ROCKY MOUNTAIN FUEL COMPANY, EMPLOYERS MUTUAL INSURANCE COMPANY, Plaintiffs in Error, vs. NICK MAES, Claimant, and INDUSTRIAL COMMISSION OF COLORADO, Defendants in Error.

I. C. 68866 **September 9, 1935** **No. 13775**

Judgment affirmed without written opinion.

EMMA TRAUNER, Plaintiff in Error, vs. CLIMAX MOLYBDENUM COMPANY, STATE COMPENSATION INSURANCE FUND AND INDUSTRIAL COMMISSION OF COLORADO, Defendants in Error.

July 15, 1935 **No. 13745**

Error to the District Court of the City and County of Denver.

HON. JAMES C. STARKWEATHER, Judge.

Judgment affirmed without written opinion.

En Banc.

INDUSTRIAL COMMISSION OF COLORADO et al. vs. BERNIECE KATHLEEN WHITE.

97 Colo. 322

I. C. 81338 **49 P. (2nd) 434** **Index No. 217**

HILLIARD, Justice.

A proceeding under the Workmen's Compensation Act. The Commission rejected the claim, but the District Court, moved thereto in a proper proceeding, ordered allowance and directed the Commission to make award. Error is assigned.

It appears that May 24, 1933, claimant's decedent underwent an appendectomy; that gangrenous conditions developed and drainage tubes in the incision were necessary; that June 26, 1933, he returned to work, but in the course thereof, at intervals, he suffered pain; that December 19, 1933, while in the course of his employment, he fell across a steel I beam in such a manner as to cause a sensation of pressure on his abdomen and pain; that on the following day, in attempting to raise a heavy object he again experienced pain in the abdominal region, his condition necessitating his removal to a hospital, where he was immediately operated for an obstruction of the small intestine; that the fourth day following the operation he died of acute nephritis primarily caused by the obstruction. It further appears that growing out of the first operation there were adhesions, not unusual where drainage is maintained through an incision, and that a loop of the intestine incarcerated in the band of adhesions brought about the obstruction.

It seems conceded that if the decendent's fall across the I beam and the strain occasioned by raising a heavy object, or either, caused the looping of the intestine, resulting in the obstruction which lead to death, then his claimants are entitled to compensation. On the other hand, if the adhesions following the first operation caused the complications resulting in death, recovery is precluded. Some seven physicians testified as to the cause of death. They were not in agreement. Some thought that to the fall and exertion of heavy lifting by decedent while on duty, the result was attributable, while others were of the opinion that the adhesions which followed the first operation caused the tragic ending.

Were we a fact finding tribunal the situation would present perplexities. In that realm of determination, however, we may not enter, for in cases of this character it is the function of the Industrial Commission to find the facts; and it found that "decedent died as a result of natural complications following his first operation, in May, 1933." The finding has respectable evidentiary support and is controlling. *Industrial Commission vs. Diveley,* 88 Colo. 190, 294 Pac. 532; *Industrial Commission vs. Aetna Life Ins. Co.,* 88 Colo. 82, 292 Pac. 229; Colorado Fuel and Iron Co. vs. Industrial Commission, 85 Colo. 237, 275 Pac. 910. We regard Carroll vs. Industrial Commission, 69 Colo. 473, 195 Pac. 1097, cited by defendants in error, as distinguishable.

Let the judgment be reversed.

MR. CHIEF JUSTICE BUTLER and MR. JUSTICE CAMPBELL concur.

VELMA CORINNE GRIFFIN AND KENNETH LOREN GRIFFIN AND SHIRLEY JEAN BRUCE, by their Guardian and next Friend, VELMA CORINNE GRIFFIN, Platintiffs in Error, vs. THE INDUSTRIAL COMMISSION OF COLORADO, A. W. ALLARD and the STATE COMPENSATION INSURANCE FUND OF THE STATE OF COLORADO, Defendants in Error.

I. C. 81773 **November 25, 1935** **No. 13767**

Error to the District Court of the City and County of Denver.

HON. CHARLES C. SACKMANN, Judge.

Judgment affirmed without written opinion.

En Banc.

O. P. SKAGGS et al. vs. JOHN C. NIXON.

97 Colo. 314

I. C. 74320 **50 P. (2nd) 55** **Index No. 218**

YOUNG, Justice.

The O. P. Skaggs Company, the American Mutual Liability Insurance Company and the Industrial Commission, plaintiffs in error, were defendants in the trial court, and will be herein designated as defendants, or by name. John C. Nixon, who was plaintiff in the trial court and claimant before the Industrial Commission and who will be herein designated as the claimant, or by name, was an attorney at law residing in Greeley, Colorado. He was employed by the Skaggs Company on a monthly retainer with special pay for extra services. While driving his automobile on returning to his home in Greeley from a conference in Denver with O. P. Skaggs and other executive officers of the Skaggs Company, his car collided with a truck and he was seriously injured.

On the hearing before a referee of the Industrial Commission, by a summary order under section 95, Session Laws of 1919 (section 4469, C. L. 1921), as amended by section 4, chapter 203, Session Laws, 1923, compensation was awarded to the claimant. On petition by the insurer for a review of the referee's order, the Commission, under section 4471, C. L. 1921, as amended by chapter 177, Session Laws, 1931, without the taking of additional testimony found "that the claimant, John C. Nixon, was not an employe of O. P. Skaggs Company within the meaning of the Workmen's Compensation Act, but, on the contrary, was an attorney for that company in business for himself, engaged in the active practice of his profession." It then set aside the referee's award and denied compensation. On petition for review the Commission, in a supplemental award, ratified and approved its former action. The claimant Nixon instituted an action in the District Court seeking to set aside this ruling of the Commission on the ground that its finding that the "claimant was not an employe of O. P. Skaggs Company within the meaning of the Workmen's Compensation Act," is unsupported by, and contrary to, the evidence. Since the sole finding of the Commission was that the claimant was not an employe of the Skaggs Company, whether or not there was evidence to support this finding or whether the uncontroverted evidence established that he was such employe, were the only two matters open for consideration by the trial court. When the court in its order setting aside the Commission's award used the words, "And the court does generally find all matters in controversy herein in favor of plaintiff and against defendants and each of them," such finding was equivalent to a finding that Nixon was an employe of the Skaggs Company, and nothing more. The question of employment was the only issue before the court.

The defendants assign numerous errors which might have been included under two heads, namely: (a) That the trial court was in error in holding as a matter of law that there was competent and uncontroverted evidence that Nixon was an employe of the Skaggs Company; and (b) that it was not shown by the evidence that at the time of the accident Nixon was performing service arising out of and in the course of his employment, or that the injury was proximately caused by accident arising out of or in the course of his employment. The trial court held—and we think rightly—that the question of whether Nixon was an employe of the Skaggs Company is determined affirmatively by the case of *Industrial Commission vs. Moynihan*, 94 Colo. 438, 32 P. (2d) 802.

We have carefully examined the briefs of plaintiffs in error wherein are set up at length matters in evidence relied upon to distinguish the instant case from the Moynihan case and to show that the relationship between claimant and the Skaggs Company was not that of employe and employer within the language of the Workmen's Compensation Act. We are not impressed with these attempted distinctions. We think the trial court properly characterized them as being of minor importance, and as not sufficiently variant to permit a different conclusion on the question of employment from that reached in the Moynihan case. We hold, therefore, that the District Court was correct in determining that there was competent evidence supporting the claim that Nixon was an employe of the Skaggs Company and that such evidence was uncontroverted. When the court determined these two matters of law, it necessarily followed that the Commission, having found that there was no employment when the uncontroverted evidence showed employment, acted in excess of its powers; consequently such finding of fact could not stand. It is contended that the court substituted its finding of fact, that Nixon was an employe of the Skaggs Company, for the finding of the Commission, but when the court's ruling is analyzed, the contention appears to be without merit. The Commission found the existence of a negative condition—non-employment. When the court found that there was competent evidence of employment and that it was uncontroverted, it was passing upon questions of law, and not making a finding of fact. The fact of employment followed from the findings of law, but in making findings of law from which conclusions of fact must of necessity follow, the trial court does not thereby usurp the fact finding function of the Commission.

The second question, involving the objection of defendants to the judgment of the trial court that there is no evidence in the record to show that at the time of the accident Nixon was performing services arising out of and in the course of his employment or that the injury was proximately caused by an accident arising out of and in the course of the employment, cannot

be determined on the record before this court. We have held too often to require the citation of authorities in support of the proposition, that the Commission alone is vested with authority to determine the facts in causes heard before it. When there is competent evidence to support the Commission's findings they are binding on all courts. In the instant case the Commission made no finding on any of the statutory prerequisites necessary to support an award of compensation as set forth in section 4389, C. L. 1921, except on the single question of employment. When the Commission set aside the summary award of its referee and assumed to make its own findings, if it awarded compensation, it must have made findings on all of the statutory prerequisites to support such award. The Commission found that one of the statutory requisites, namely, the relationship of employer and employe, was lacking and went no further. The District Court, having found as a matter of law that there was competent and uncontroverted evidence of employment, which finding we approve, leaves the other statutory prerequisites to recovery of compensation to be determined before it can be said that the claimant has had a full hearing on his claim. In such a situation the District Court should have remanded the cause to the Commission with instructions to determine whether at the time of the accident the claimant was performing services arising out of and in the course of his employment, the extent of such injuries, and the amount of compensation due. Sec. 4476, C. L. 1921, *Tavenor vs. Royal Indemnity Co.*, 84 Colo. 521, 272 Pac. 3; *Industrial Commission vs. Dorchak*, 97 Colo. .., 46 P. (2d) 902.

We cannot assume from the record—neither could the trial court make such assumption—that all of the evidence necessary for a determination on these remaining undetermined matters was before the Commission. Section 4471, C. L. 1921, as amended by chapter 177, Session Laws, 1931, provides that when the Commission reviews an award of its referee, it shall "review the entire record in said case, *and, in its discretion may take or order the taking of additional testimony, and shall make its findings of fact and enter its award thereon.*" Until the Commission has exercised such discretion and made its findings, neither the trial court nor this court should say that the testimony, whether uncontroverted or not, may be taken in lieu of findings of fact by the Commission. If the Commission had assumed to make findings on the undetermined prerequisites to claimant's recovery of compensation, now before us, as it did on the question of employment, thus indicating that it had exercised its discretion not to take additional testimony on those issues, but was satisfied with the testimony already submitted thereon, then the court might assume as found whatever the uncontroverted evidence might show, but it may not accept any conclusions as to any issue even on uncontroverted evidence until the Commission has first made its finding thereon, and thereby indicated its willingness to have such issue determined on the record as it stands.

In the Moynihan case the Commission found "that his accident did not arise out of and in the course of his employment, by respondent employer as defined by the statute." In the instant case, as indicated by the quotation from the Commission's finding, supra, there is no finding at all on this matter. In the Moynihan case the District Court specifically found that the *uncontroverted* evidence showed "That at the time plaintiff sustained said personal injuries as aforesaid, plaintiff was performing service arising out of and in the course of his said employment by defendant, The Oliver Power Company. * * * That the said injuries sustained by plaintiff as aforesaid were proximately caused by accident arising out of and in the course of his said employment by defendant The Oliver Power Company, and said injuries were not intentionally self-inflicted." There was no assignment of error based on these findings of the court and in the argument presented by the briefs in this court, which we have examined, both the plaintiff in error and defendant in error confined themselves to a discussion of two questions only, namely: that the District Court erred in holding that Moynihan was an employe within the provisions of the Workmen's Compensation Act, and if he were such employe that he was a casual employe whose employment was not in the usual course of business of the Oliver Power Company, and that therefore he was excluded from the benefits of the Workmen's Compensation Act. The Moynihan case, though authority for holding that the relationship of employer and employe exists in this case, should not be taken as a determination by this court that the evidence in that case sustained the propositions that Moynihan was at the time of the accident engaged in service arising out of and in the course of his employment, or that the accident that caused his injuries arose out of and in the course of his employment, because that question was never submitted to the District Court nor to this court for determination. The findings of the District Court that under the record in this case there is competent evidence that Nixon was an employe of the Skaggs Company and that such evidence was uncontroverted was correct and settles that issue in this case.

The judgment of the District Court setting aside the Commission's award and holding that the uncontroverted evidence in the case established the relationship of employer and employe between Nixon and the Skaggs Company is affirmed. The judgment of the court in so far as the same refers the cause back to the Commission for the purpose of determining solely the question of the extent of injuries and the amount of compensation is reversed, with instructions to refer the cause back to the Commission for all further proceedings required by the views expressed in this opinion.

MR. CHIEF JUSTICE BUTLER and MR. JUSTICE BURKE concurring.

ANNE BREZINSKY, and NATHAN ROTHSCHILD, as Guardian of the Estate of MAX BREZINSKY, a Minor, Plaintiffs in Error, vs. INDUSTRIAL COMMISSION OF COLORADO; BOARD OF TRUSTEES, CONGREGATION EMANUEL, and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, a Corporation, Defendants in Error.

I. C. 85176 **September 30, 1935** **No. 13776**

Error to the District Court of the City and County of Denver.

HON. JAMES C. STARKWEATHER, Judge.

Judgment affirmed without written opinion.

En Banc.

H. G. HULL vs. THE DENVER TRAMWAY CORPORATION and INDUSTRIAL COMMISSION OF COLORADO.

97 Colo. 523

I. C. 74639 **50 P. (2nd) 791** **Index No. 219**

HILLIARD, Justice.

On motion to dismiss writ of error in a proceeding under the Workmen's Compensation Act.

The claim having been rejected by the Commission, claimant brought this action in the District Court, where, July 31, 1935, judgment went against him. Writ of error issued September 13, 1935.

In the circumstances, the statute (S. L. 1931, p. 825, sec. 1, amending original sec. 106) required the clerk of the District Court to return the record to the Commission "within twenty-five days after the order or judgment of the court, unless in the meantime, a writ of error addressed to the District Court shall be obtained from the Supreme Court for the reviewing of such order or judgment." We have said that this section "operates as a short statute of limitations." *Kosmos vs. Industrial Commission*, 96 Colo. 90, 39 P. (2d) 786. Also, that it is an "express mandate in form, * * * mandatory in substance." *General Chemical Co. vs. Thomas*, 71 Colo. 28, 203 Pac. 660. "Only to this section may we look when determining within what time a writ of error seeking review of a proceeding based on the general act, must be obtained." *Lawrence vs. Industrial Commission*, 91 Colo. 179, 13 P. (2d) 261. The sum of the doctrine is that an aggrieved party has only twenty-five days within which to sue out a writ of error.

Counsel opposing the motion to dismiss, no less than those proposing, subscribe to the salutariness of the rule developed through the decisions reviewed above. They urge, however, that since well within the period of twenty-five days they had prepared their bill of exceptions for the judge's signature, but due to his absence it was not signed until after such time, the delay in procuring the writ of error was unavoidable, and that the rule should be varied accordingly. The weakness of counsel's position is their assumption that to procure a writ of error the record must be filed at the time the writ is sought. In practice the record is frequently lodged simultaneously with the application for writ of error, but it should be borne in mind that issuance of the writ is not dependent thereon. The record may be filed subsequently. Indeed, the particular office of the writ is to require the clerk of the court in which the judgment complained of is entered, to certify the record for review. Rule 19. "The writ of error is a writ of right." Monti vs. Bishop, 3 Colo. 605. It is issued as of course on petition or praecipe. 2 R. C. L., 101, sec. 74. On request the clerk of the Supreme Court supplies printed blanks. The practice is exceedingly simple.

Nothing called to our attention operated to prevent plaintiff in error from procuring his writ of error within the customary twenty-five day period. It follows that the motion to dismiss should be granted. Let it be so ordered.

MOFFAT COAL COMPANY et al. vs. PETE COMETA and INDUSTRIAL COMMISSION OF COLORADO.

97 Colo. 573

I. C. 62811 **51 P. (2nd) 593** **Index No. 220**

BURKE, Justice.

Plaintiffs in error are hereinafter referred to as the Coal Company and the Insurance Company, and defendants in error as Cometa and the Commission, respectively.

This is a Workmen's Compensation case. The Insurance Company carried the industrial insurance of the Coal Company whose employe Cometa was. He was injured in an accident arising out of and in the course of that employment and was awarded fifteen per cent permanent, partial disability. Later the case was reopened by the Commission on its own motion and this disability raised to twenty per cent. These awards were accepted and have been paid in full. Again the Commission reopened the case, took additional testimony, and, on the ground of changed conditions, increased the allowance to twenty-five per cent. The legality of this increase is the question presented here. The Commission having denied a review thereof the Coal Company and the Insurance Company brought this action in the District Court. There the award was affirmed To review that judgment this writ is prosecuted and the following errors assigned:

1. "The court erred in rendering judgment in favor of defendants and against the plaintiffs.

2. The court erred in not rendering judgment for the plaintiffs and against the defendants.

3. The court erred in rendering judgment affirming the award of the Industrial Commission of Colorado.

4. The court erred in not rendering judgment vacating the award of the Industrial Commission of Colorado."

All these amount to is the simple general statement, worded in four different ways, that the judgment was wrong. These assignments do not even hint at the questions to be presented under them. Our rule 32 required that "Each error shall be separately alleged and particularly specified," and we have repeatedly held that these general assignments are no compliance therewith and will not be noticed.

Ohio Casualty Co. vs. Colo. Portland Cement Co. .. Colo. .., .. Pac. ... (No. 13505—Decided November 4, 1935.)

The rule and authorities apply in Workmen's Compensation cases as in others. They are reviewed here "by writ of error as provided by law."

Sec. 4482, C. L. 1921.

Two questions are in fact argued under these assignments: 1. That the evidence does not support the findings; and 2. That the findings do not support the award. It will be observed that the assignments have just as much relation to a claim of fraud as to these.

We find ourselves unable to agree with counsel's contention that this is not a case of conflicting evidence. We believe it to be such.

The second contention is based upon the omission from the award of the words "due to the accidental injury." Having reached the conclusion that there is evidence to support the findings we are forced to the further conclusion that it sufficiently appears, from other language used by the Commission, that the changed condition was found due to the accidental injury.

The judgment is affirmed.

MR. CHIEF JUSTICE BUTLER and MR. JUSTICE YOUNG concur.

INDUSTRIAL COMMISSION OF COLORADO et al. vs. W. R. BARTON.
98 Colo. 51
I. C. 83513 **52 P. (2nd) 670** **Index No. 221**

YOUNG, Justice.

The plaintiffs in error will be designated in this opinion as the Commission and the company, and the defendant in error as claimant.

Claimant, a painter, was employed by the company to stain, varnish and shellac baseboards in the girls' dormitory under construction at the State University in Boulder, Colorado. The concrete floor had been laid and the rooms were littered with shavings, small pieces from the sawed ends of lumber, and quarter round finishing material. In doing his work it was necessary for claimant to be on his knees, or knee; particularly the left knee. Sometime during the first of August, 1934, and after he had been employed for approximately ten or eleven weeks, claimant's left knee began to pain him and to swell, and on the 11th of August he reported to the foreman that he had bruised his knee, which fact appears from the report of the company filed with the Commission. The evidence discloses that on Thursday, preceding Monday the 13th of August, the claimant had complained at a Union meeting to members of his union about trouble with his knee. On the 13th of August the condition of the knee was such that he could not continue his work and he was discharged by the foreman. Shortly thereafter he went to a doctor who diagnosed the condition from which he was suffering as housemaid's knee.

This doctor testified that claimant told him of the character of the work he was doing, but gave him no history of an injury to the knee or disability other than such as resulted from kneeling in the course of his employment; that from the history given it was his opinion that the cause of the condition was from the pressure on the knee incident to the character of the work, and the position claimant was required to assume in doing it. September 24th, the claimant filed with the Commission a "notice and claim for compensation" in which under the heading, "Describe briefly how the accident occurred," he stated, "Bruised by striking sawed ends of quarter-round and sawed ends of lumber on floor on my knees." At the hearing before the referee in answer to the question, "Tell us what you were doing on August 10th and just how your accident happened," the claimant answered: "I have been doing, all spring and summer, just base-board work, nothing but finishing the baseboards, shellacking, staining and rubbing them down. There are 384 rooms there, I think, and I was there about eleven weeks before this happened." He was then asked, "This work required you to be on your knees most of the time, did it?" and he answered, "Yes, sir." The foregoing is all the testimony that appears in the record of the first hearing as to the cause of claimant's condition.

The referee after the first hearing made the following finding, under date of October 10, 1934: "Claimant was employed by above-named respondent

employer as a painter. For a period of three months he had been engaged in staining, shellacking and varnishing base-boards, which required him to work on his knees. On August 1, 1934, he became conscious of a condition which caused him to leave his employment on August 13, 1934. This condition was diagnosed by the attending physician as 'Housemaid's knee.' The left knee was so affected. Claimant was able to return to work on August 23, 1934, and whether or not he has suffered any permanent disability was not shown. The referee finds from the evidence that claimant's condition is not the result of an accidental injury within the meaning of the Workmen's Compensation Act; that said condition is in the nature of an occupational disease and, therefore, not compensable under the law." On this finding compensation was denied.

The claimant was not represented by an attorney at the first hearing and made no application to have the finding of the referee reviewed until the time limited by statute for such application had passed. He later procured the services of an attorney who filed another claim for him setting forth how the accident was caused in substantially the same words as in the original claim filed by the claimant. Application then was made to the Commission to reopen the case and grant a further hearing, and on February 14, 1935, the Commission reopened the case on its own motion for the purpose of determining whether or not there had been any error, mistake or change in condition.

On the second hearing the claimant testified that during the week prior to the 13th of August he kneeled down on a sawed piece of quarter-round with his left knee "and rolled on it;" that he looked at his knee immediately but "that it did not show much then." He stated that his knee began to swell from then on. Prior to this hearing he had consulted another surgeon who had operated on his knee. He had told this surgeon of bruising the knee on the piece of quarter-round and on this history of the case the surgeon gave it as his opinion that the condition of housemaid's knee had been caused by the injury sustained in rolling on the piece of quarter-round. The surgeon further testified that housemaid's knee could be caused from an acute injury or from long continued pressure on the knee from kneeling. That at the time he saw the claimant he could not determine from his examination whether the condition was the result of slipping on the block or from the long continued pressure in the course of his work. At the close of this hearing the Commission affirmed the referee's award as the final award of the Commission.

On trial in the District Court, the court found the issues joined in favor of the claimant, set aside the finding of the Commission, remanded the case and ordered the Commission to enter its award in accordance with the findings of the court granting and sustaining the claimant's claim for compensation, and further ordered that it find and determine the amount and extent of the compensation to which claimant was entitled, holding such further hearings as might be necessary.

We are of the opinion that the foregoing presents merely a case of conflicting evidence. On the two hearings there was competent testimony before the Commission that the claimant sustained a bruise to his knee by kneeling on, and slipping off, a sawed-off end of quarter-round. Unquestionably this would constitute an accident. There is medical testimony that the disease known as housemaid's knee may be caused by an acute injury or bruise on the knee. From the whole record it appears that claimant was engaged in work over a period of ten or eleven weeks that required him to be much on his left knee, and there is competent medical testimony that such long continued pressure on the knee is a common cause of housemaid's knee.

Where an existing condition may result from one of two causes shown in the evidence, it is the province of the Commission, as the fact-finding body, to determine which of these two causes produced the result of which complaint is made. Such determination is the determination of a fact. The Commission in adopting and making its own the findings of the referee, that "claimant's condition is not the result of an accidental injury within the meaning of the Workmen's Compensation Act; that said condition is in the nature of an occupational disease," determined by necessary inference that the condition from which claimant was suffering was not caused by accident, that is, his slipping on the block, but was caused by the pressure on his knee incident to the character of the work in which he was engaged. There being evidence to support the findings it was binding upon the District Court, and it was error for the court to set aside such findings and order an award of compensation.

The judgment is reversed.

MR. CHIEF JUSTICE BUTLER and MR. JUSTICE BURKE concur.

ARTHUR ROEDER AS TRUSTEE FOR THE COLORADO FUEL AND IRON COMPANY vs. INDUSTRIAL COMMISSION OF COLORADO and PETE STAMAS.

98 Colo. 95

I. C. 44635 **52 P. (2nd) 668** **Index No. 222**

HILLIARD, Justice.

A proceeding under the Workmen's Compensation Act (C. L. 1921, Sec. 4375 et seq., as amended).

July 22, 1926, as the result of an accident arising out of and in the course of his employment, Pete Stamas, claimant, was injured; July 17, 1928, he was

awarded compensation for temporary total disability from the date of the injury to June 13, 1928, and additional compensation thence for 75 per cent permanent total disability during expectancy, fixed in the order; October 1, 1933, the concluding payment of the aggregate sum of the award, $4,220.94, was made; November 17, 1933, claimant, alleging change of condition, petitioned the Commission to reopen the cause; November 23, 1933, reciting that it had reviewed the file, the Commission denied the petition; September 19, 1934, claimant, alleging that he "now is 100 per cent totally and permanently disabled," asked that the cause be reopened for further testimony and award; October 5, 1934, the Commission ordered further hearing, and January 29, 1935, testimony was taken; February 21, 1935, the Commission made an award that claimant "is 100 per cent disabled," and ordered resumption of compensation, at the rate and as of the date of the last payment, October 1, 1933; March 11, 1935, the Commission affirmed the award of February 21, 1935; March 30, 1935, plaintiff in error filed complaint in the District Court to set aside the findings, which was denied June 13, 1935; July 5, 1935, writ of error issued.

Two points are urged for reversal: (1) That the record does not justify the award to resume payment of compensation; (2) that neither in the evidence nor the findings of the Commission is there basis for the retroactive part of the award.

1. While the showing as to claimant's condition at the latest hearing was not so clear as to remove all doubt, we are persuaded, nevertheless, that under well established rules the finding of the commission has such record basis as to conclude us.

2. On the retroactive feature of the award, however, we are constrained to hold that the requisite showing is wholly lacking. In support of claimant's petition to reopen, filed September 19, 1934, testimony was given January 29, 1935. Not until then was there testimony justifying the Commission in ordering resumption of payment of compensation; and the witnesses there, describing claimant's condition, invariably spoke in the present tense. We find nothing in the record on which to determine claimant's condition between October 1, 1933, when he received the last payment under the original award, and January 29, 1935, the date when further evidence was taken. At least once during that time, as we have seen, the Commission declined to reopen the case. In its award of February 21, 1935, the Commission, following the lead of the witnesses, limited its finding to what claimant's condition "is." The Commission's finding, as we have already determined, is sufficiently based, but the effective date of its award is without support. Fairly, the whole record considered, the new award should have been as of the date of the showing, January 29, 1935.

Let the judgment be reversed, the trial court to order the Commission to amend its award as indicated.

MR. CHIEF JUSTICE BUTLER and MR. JUSTICE BOUCK concur.

PIETRO DI GREGORIO vs. THE MONROE COAL COMPANY et al.

98 Colo. 267

I. C. 86906 **55 P. (2nd) 715** **Index No. 223**

BURKE, Justice.

This is a Workmen's Compensation case. Plaintiff in error is hereinafter referred to as claimant and defendants in error as the Coal Company, the Insurance Company, and the Commission respectively.

Claimant was employed by the Coal Company whose insurance, under the statutes applicable, was carried with the Insurance Company. He claimed disability due to an accident, occurring February 25, 1935, arising out of and in the course of his employment. He filed his claim and a hearing was had thereon. The Commission found "from the medical testimony" that claimant's disability was due to "sub-acute appendicitis" and was "neither caused nor aggravated" by the accident. On an application for review the award was affirmed, and this action in the District Court followed. The court upheld the Commission and to review its judgment, entered accordingly, this writ is prosecuted.

The only question raised by the assignments and argued by claimant's counsel is, Was claimant entitled to compensation for temporary disability in view of the Commission's finding that "this accident occurred on February 25, 1935, claimant left work as a result thereof that same day." The argument assumes that this is a finding of disability caused by the accident, such as to oblige cessation of labor. This may appear at first glance but upon further examination is nothing to support the conclusion. Claimant may well have quit work as a result of the accident although the accident caused no disability whatever. That the Commission did not intend by the language quoted to find that the accident caused disability is clearly disclosed by all the remainder of its findings and award. Beyond this the record before us presents a simple case of a finding of fact by the Commission on conflicting evidence and no argument can make anything else out of it. Were we at liberty to do so we might possibly reach another conclusion than that arrived at by the Commission but that field is closed to us by the applicable legislation. The finding of the Commission and the judgment of the court have sufficient evidence to support them and must be, and are, affirmed.

Industrial Commission of Colorado vs. White 97 Colo. 322; 49 Pac. (2d) 434.

PEARL MORROW vs. INDUSTRIAL COMMISSION OF COLORADO et al.
98 Colo. 348
I. C. 79462 **56 P. (2nd) 35** **Index No. 224**

November 25, 1935.

En Banc.

HOLLAND, Justice.

Plaintiff in error, being unsuccessful in the prosecution of her claim for compensation before the Industrial Commission, and its finding being upheld by the District Court, seeks reversal of the judgment entered against her. She will be designated as claimant, and reference will be made to defendants in error as the Commission, the carrier and the school district.

Claimant was employed by school district No. 16, Adams county, as a teacher and under her contract was to receive a salary of $125.00 per month. On October 2, 1925, while coaching a basketball game, she fell and received an injury to her spine, necessitating a removal to her home where she has been bedridden almost continuously since the date of the injury. Following the injury, the school district paid to her for seven months, or to the time of the expiration of the contract, the salary of $125 each month, out of which claimant paid a substitute teacher, who she employed, the sum of $100 per month. She filed claim for compensation September 28, 1933, approximately eight years after the date of her injury. Upon hearing, a referee determined, as a matter of law, that the claim was barred by section 84 of the Workmen's Compensation Act, being section 4458, C. L. 1921, as amended by Session Laws of 1923, chapter 201, section 15, and concluded the hearing as to the nature and extent of the injury. The Commission affirmed the referee's finding and then followed an affirmance of the Commission's finding by the District Court. The statute above referred to is as follows:

"* * * * The right to compensation and benefits, as provided in this Act, shall be barred unless within six months after the injury, or within one year after death resulting therefrom, a notice claiming compensation shall be filed with the Commission. This limitation shall not apply to any claimant to whom compensation has been paid."

The sole question presented is, whether or not the payment of the salary indicated, constituted a payment of compensation within the statutory meaning of that term so as to bring claimant within the exemption of the statute. The testimony of the secretary of the school board disclosed that he did not know whether claimant paid the substitute teacher all or only part of the $125 monthly salary. He stated: "We didn't care to ask that because we were satisfied with the substitute and we were willing that she pay the substitute and we didn't care so long as she was paid; that is all we wanted to know."

Claimant contends that the salary payment to her was a payment of compensation and, as to her, removed the operation of the bar of the statute. There is no dispute concerning the circumstances or conditions under which this salary was paid. The school district was under contract to pay for and receive the services of a teacher at a specified amount and for a definite period. This contract, the school district fully performed. There is nothing to indicate that in making payments thereunder it recognized any liability, other than a contractual one. It made no kind of payments after the termination of the contract period. It did not pay anything to the substitute teacher or to anyone else on account of teaching services or as compensation for the injuries sustained by claimant. The payments made were not in the nature of a benefit or for expense incurred. The school district, receiving satisfactory services from the substitute, was not concerned with the contract between claimant and the latter.

Claimant in reason, cannot rely upon the salary payments made by the school district under an unwarranted claim that they were for disability compensation, to excuse her delay of approximately eight years in presenting her claim. If at any time during the period of payment by the school district, she considered this to be a payment of liability compensation, she knew of its discontinuance at the termination of her salary contract with the school district. The facts in the cases relied upon by claimant, to substantiate her theory are radically different from those in the case at bar and hence those cases are not applicable here.

Judgment affirmed.

MR. JUSTICE BURKE, MR. JUSTICE HILLIARD and MR. JUSTICE BOUCK dissent.

No. 13815
Morrow vs. Industrial Commission.

November 25, 1935.

MR. JUSTICE BOUCK, dissenting:

From the decision and opinion of the majority I respectfully dissent.

This case involves a claim under the Workmen's Compensation Act. It is of course our duty to give the Act a liberal construction, with a view to promoting the underlying purpose of applying its beneficent provisions whenever legally possible, in the interests of justice. *Central Surety & Ins. Corp. vs. Industrial Commission*, 84 Colo. 481, 271 Pac. 617.

The claimant, Miss Pearl Morrow, a public school teacher, then 23 years of age, sustained a compensable injury on October 2, 1925, on the school grounds,

while coaching and supervising the pupils in their basketball play. She has been bedridden ever since. Three times she was in the Colorado General Hospital at Denver for observation or treatment, once for a prolonged period of months. For a while she was similarly in St. Luke's Hospital at Denver. There is no doubt about the hopelessness of her condition. The possibility of malingering or bad faith on her part is not even suggested. Hers is clearly a case of permanent total disability.

J. K. Morrow, father of the claimant, was the principal regularly employed by the school board and as such had full charge of the school where Miss Morrow taught. According to the uncontradicted evidence, she performed her duties under his orders and direction, exactly like any other teacher in the school.

1. If a notice claiming compensation had been filed with the Industrial Commission by or on behalf of the claimant within six months after the injury, in accordance with section 84 of the Workmen's Compensation Act (section 15, chapter 201, S. L. 1923, page 744, amending section 4458, C. L. 1921), it would have been the plain duty of the Commission, under the evidence, to find in favor of Miss Morrow and award compensation for permanent total disability.

Such a notice was not given. Until long after the expiration of the six-month period from the date of the injury, the claimant did not know of her right to claim industrial compensation. Neither her father nor any other relative or friend informed her of her right.

In contrast with the claimant's ignorance of the applicability of the Act to her own case stand out the following facts: At the time of the injury the school board carried workmen's compensation insurance with the State Compensation Insurance Fund presumably with the very intent and purpose of compensating for injuries such as the one here involved. The man who then was and still is secretary of the school board knew of the injury immediately after it happened. He was aware that a substitute teacher would be required. He and the other two school directors acquiesced in the choice of substitute made by their duly appointed principal, and at least tacitly permitted him to employ the substitute and to arrange for her pay. There is no evidence to indicate that the claimant either directly or indirectly assumed to or did hire the substitute. The majority opinion is in error when it declares that the claimant did employ her. The record shows that Principal Morrow did so.

Notwithstanding all this, the school board and its secretary failed in the duty of giving the Commission the notice required by that part of the aforesaid section 84 which says: "Notice of an injury, for which compensation and benefits are payable, shall be given by the employer to the Commission within ten days after the injury."

The result was that no notice of any kind was filed with the Commission by employer or employe until the formal claim was filed on September 28, 1933, almost eight years after the injury.

2. No notice having been filed with the Industrial Commission within the six-month period prescribed by said section 84 of the Act, the claimant manifestly cannot recover compensation unless she comes within the terms of the last sentence in the section: "This limitation shall not apply to any claimant to whom compensation has been paid."

I think she does come within that provision.

There is in the record no contention or hint that the contract between Miss Morrow and the school district was other than an ordinary contract for personal services to be rendered by her in consideration of a stipulated salary. While it purported to run for the school year, it was effectively terminated by the immediate and permanent incapacitation resulting from the accident. She could not thereafter render any personal services and the district was no longer bound to pay her anything. The evidence fails to show that the contract required Miss Morrow to provide a substitute in her stead. The record forces the conclusion that the right and duty of supplying somebody to take her place devolved upon the school district if it desired to have the vacancy filled. The evidence is unequivocal that the substitute was actually appointed by the school principal, that he made the financial arrangement with the substitute, and that the school directors acquiesced in what he did in this regard on behalf of the district. He was the natural and logical representative of it. The district either authorized his acts or ratified them, the school board adopting his arrangement. Under elementary rules of agency, the district was bound by the acts of Mr. Morrow, and his knowledge became the knowledge of the district. Thereby the district was charged with notice that the substitute had been appointed by its agent at a salary of only $100 per month. The secretary's failure to inquire about the specific arrangement does not change the fact that, in the circumstances shown, the arrangement must be deemed made by the board itself. It was the duty of the directors to inquire. The board paid to the bedridden claimant $125 per month, and must be considered as knowing that $25 was retained each month by Miss Morrow when she, to the knowledge of the district, could not render any services for which the district officers could lawfully pay her.

Since the contract for Miss Morrow's personal services was terminated, we must ascertain the legal aspect of the resulting situation. The secretary of the school board and his fellow directors are, of course, entitled to the usual presumption of honesty and regularity in their official conduct. Hence we are not to say that the aforesaid $25 per month was given Miss Morrow as a gift or by way of alms. A payment for such a purpose would have been both irregular and dishonest. It would have been unlawful. One cannot properly indulge in any hypothesis of malfeasance. The only logical escape from such an hypothesis is by viewing the $25 payments as payments of compensation for the injury. It would not have been improper or unlawful for the district to make compensation

payments deliberately, and with either an express or an implied understanding by the directors that they should be such; the particular amounts and their number being immaterial. To give the like effect to the payments made in this case, through the arrangement effected by the school principal as heretofore described, is in compliance with the above mentioned presumption of official honesty and regularity. No evidence is before us to overcome that presumption. The court ought, I submit, to hold that this case therefore falls within the principle announced in *Comerford vs. Carr*, 86 Colo. 590, 284 Pac. 121.

It would, of course, be a stultification for any court to declare that, because the principal, Mr. Morrow, also happens to be the claimant's father, he should not be considered the representative and agent of the school board in arranging for the division of the salary warrant. The defendants in error advance no such contention, and Mr. Morrow's honesty and good faith are conceded.

The judgment of the lower court, affirming the order of the Industrial Commission which refused to make an award because of claimant's failure to file a notice of claim with the Commission within six months after the injury, should be reversed, and the case remanded to the District Court with directions to return the record to the Commission, ordering that body to proceed with the fixing and award of compensation for the claimant.

Because the majority affirms the judgment, I deem it my duty to give the foregoing reasons of my dissent.

MR. JUSTICE HILLIARD concurs in this opinion.

March 2, 1936.

In Department.

BOUCK, Justice.

This case involves a claim under the Workmen's Compensation Act. The claim was denied by the Industrial Commission. That denial was affirmed by the District Court, and the claimant is here as plaintiff in error, asking a reversal.

It is of course our duty to give the Act a liberal construction, with a view to promoting the underlying purpose of applying its beneficent provisions whenever legally possible, in the interests of justice. *Central Surety & Ins. Corp. vs. Industrial Commission*, 84 Colo. 481, 271 Pac. 617.

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Such a notice was not given.

Until long after the expiration of the six-month period from the date of the injury, the claimant did not know of her right to claim industrial compensation. Neither her father nor any other relative or friend nor any stranger informed her of her right.

In contrast with the claimant's ignorance of the applicability of the Act to her own case stand out the following facts: At the time of the injury the school board carried workmen's compensation insurance with the State Compensation Insurance Fund presumably with the very intent and purpose of compensating for injuries such as the one here involved. The man who then was and still is secretary of the school board knew of the injury immediately after it happened. He was aware that a substitute teacher would be required. He and the other two school directors acquiesced in the choice of substitute made by their duly appointed principal, and at least tacitly permitted him to employ the substitute and to arrange for her pay. There is no evidence to indicate that the claimant either directly or indirectly assumed to or did hire the substitute.

Notwithstanding all this, the school board and its secretary failed in the duty of giving the Commission the notice required by that part of the aforesaid section 84 which says: "Notice of an injury, for which compensation and benefits are payable, shall be given by the employer to the Commission within ten days after the injury."

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We think she does come within that provision.

There is in the record no contention or hint that the contract between Miss Morrow and the school district was other than an ordinary contract for personal services to be rendered by her in consideration of a stipulated salary. While it purported to run for the school year, it was effectively terminated by the immediate and permanent incapacitation resulting from the accident. She could not thereafter render any personal services and the district was no longer bound to pay her anything. The evidence fails to show that the contract required Miss Morrow to provide a substitute in her stead. The record forces the conclusion that the right and duty of supplying somebody to take her place devolved upon the school district if it desired to have the vacancy filled. The evidence is unequivocal that the substitute was actually appointed by the school principal, that he made the financial arrangement with the substitute, and that the school directors acquiesced in what he did in this regard on behalf of the district. He was the natural and logical representative of it. The district, either authorized his acts or ratified them, the school board adopting his arrangement. Under elementary rules of agency, the district was bound by the acts of Mr. Morrow, and his knowledge became the knowledge of the district. Thereby the district was charged with notice that the substitute had been appointed by its agent at a salary of only $100 per month. The secretary's failure to inquire about the specific arrangement does not change the fact that, in the circumstances shown, the arrangement must be deemed made by the board itself. It was the duty of the directors to inquire. The board paid to the bedridden claimant $125 per month, and must be considered as knowing that $25 was retained each month by Miss Morrow when she, to the knowledge of the district, could not render any services for which the district officers could lawfully pay her.

Since the contract for Miss Morrow's personal services was terminated, we must ascertain the legal aspect of the resulting situation. The secretary of the school board and his fellow directors are, of course, entitled to the usual presumption of honesty and regularity in their official conduct. Hence we are not to say that the aforesaid $25 per month was given Miss Morrow as a gift or by way of alms. A payment for such a purpose would have been both irregular and dishonest. It would have been unlawful. One cannot properly indulge in any hypothesis of malfeasance. The only logical escape from such an hypothesis is by viewing the $25 payment as payments of compensation for the injury. It would not have been improper or unlawful for the district to make compensation payments deliberately, and with either an express or an implied understanding by the directors that they should be such; the particular amounts and their number being immaterial. To give the like effect to the payments made in this case, through the arrangement effected by the school principal as heretofore described, is in compliance with the above mentioned presumption of offical honesty and regularity. No evidence is before us to overcome that presumption.

This case falls within the principle announced in *Comerford vs. Carr*, 86 Colo. 590, 284 Pac. 121.

It would, of course, be a stultification for any court to declare that, because Principal Morrow also happens to be the claimant's father, he should not be considered the representative and agent of the school board in arranging for the division of the salary warrant. The defendants in error advance no such contention, and Mr. Morrow's honesty and good faith are conceded.

The judgment of the lower court, affirming the order of the Industrial Commission which refused to make an award because of claimant's failure to file a notice of claim with the Commission within six months after the injury, must be reversed, and the case remanded to the District Court with directions to return the record to the Commission, ordering that body to proceed with the fixing and award of compensation for the claimant.

The original opinion, which read for affirmance, is withdrawn and the present opinion is substituted therefor.

Judgment reversed with directions.

MR. JUSTICE HOLLAND dissents.

MARTIN MISHMISH et al. vs. HAYDEN COAL COMPANY et al.

98 Colo. 373

I. C. 80898 **56 P. (2nd) 21** **Index No. 225**

YOUNG, Justice.

This is a workmen's compensation case. Martin Mishmish, the claimant, was awarded $3,640 by the Industrial Commission for permanent partial disability. The District Court in appropriate proceedings, vacated and set aside the award. Claimant and the Industrial Commission assign error.

The evidence is undisputed that claimant was employed by the Hayden Coal Company, herein referred to as employer, and that he sustained severe bruises to his hip and one or two fractured ribs while riding an empty coal car which collided with some loaded cars standing on a switch. The accident occurred underground in a mine of the employer September 19, 1933, and as a result thereof claimant was confined to a hospital for several weeks. He returned to work December 9, 1933, and worked one day. Resuming his employment December 27, 1933, he worked up to and including February 13, 1934, on which date he claims that it was necessary for him again to cease work on account of disability resulting from the accident.

A hearing was held before a referee of the Industrial Commission March 21, 1934, resulting in an order allowing compensation from September 30, 1933, dur-

ing disability, less the period from December 27, 1933, to February 13, 1934, plus the one day that he was employed on December 9, 1933. On May 15, 1935, another hearing was held after which the referee made and entered findings that the claimant sustained no disability by reason of his accident from and after July 1, 1934; that there was no permanent disability by reason of his accident; that any disability which he suffered after said date was due to pneumoconiosis (miners' consumption); that such condition had not been aggravated or accelerated by the injury, and an order was entered denying compensation.

The claimant petitioned for review of this order and June 28, 1935, the Commission made findings of fact, which were in substantial effect the same as the findings made by the referee, also denying compensation for permanent injury. Following the making of such findings and denial of compensation claimant, by letter which was received and filed by the Commission on July 12, 1935, within the fifteen days allowed for the filing of a petition for a review of the Commission's finding and award, expressed himself as dissatisfied with the findings and award; called attention to the fact, that he had been examined by the company doctor before going to work in the mine; that there was nothing physically wrong with him before the accident and referred to the testimony of five doctors which tended to show that his then disability was attributable to the accident. The Commission elected to consider this as a petition for a review and July 23, 1935, entered a supplemental award which so far as material to the issues involved in this case is as follows: "The Commission now finds from the record that prior to September 19, 1933, claimant was probably effected (affected) with mild pneumoconiosis, but if so, it was in no way disabling, as he had worked continuously and without interruption prior to the date of his accident; that the fractured fifth rib, hereinabove referred to, has not healed with firm boning union, but that claimant has only a fibrous union with an over-lapping of the impingement of the intercostal nerve by the callus formation of the fractured rib; that said fibrous union and intercostalgia are not only tender and painful, and not only disabling in themselves, but they have aggravated claimant's pre-existing pneumoconiosis to such a degree that it now manifests itself in the kidneys and heart.

"The Commission further finds that claimant attained his maximum degree of improvement on July 1, 1934, and that as a result of claimant's injury, he has suffered a permanent partial disability equal to 50% as a working unit; that his average weekly wages were $16.90; his age 40 years and his expectancy of life 28.18 years.

"Wherefore, the Commission now finds that on prior review it improperly weighed the evidence herein, and that its Order of June 28, 1935, was in error and should be vacated, set aside, and held for naught.

"It Is Therefore Ordered: That the Commission's Order of June 28, 1935, be and the same is hereby vacated, set aside, and held for naught.

"Further Ordered: That the respondents pay compensation to the claimant * * * for and on account of permanent partial disability * * *."

Numerous doctors testified as to claimant's condition and its cause. All agreed that he was suffering to some extent from miners' consumption. As to all other matters found by the Commission the evidence was conflicting.

The employer and the insurance carrier sought a review of the supplemental award of the Commission of July 23, 1935, on the ground that the Commission acted without and in excess of its powers in finding the claimant sustained permanent partial disability upon the identical evidence on which it had held the contrary in its award of June 28, 1935, and that the reason given by the Commission for such contrary finding, "That on prior review it improperly weighed the evidence," was not sufficient in law. Such reason they say is merely equivalent to a statement that one of the members of the Commission had changed his mind. By a supplemental award dated August 5, 1935, the Commission denied the petition for review and affirmed its award of July 23, 1935.

The sole question involved is whether or not the Commission acted without and in excess of its powers in vacating its award of June 23, 1935, in which it found there was no permanent injury and denied compensation, and entering its award of July 23, 1935, in which it found permanent injury as a result of the accident and awarded compensation, on the ground "that on prior review it improperly weighed the evidence." In support of their contention that the Commission exceeded its authority the employer and the insurer rely on the case of *Rocky Mountain Fuel Co. vs. Sherratt*, 96 Colo. 463, 45 P. (2d) 643.

The Sherratt case was twice before this court. The statute, section 4484, C. L. 1921, provides that the Commission "on the ground of error, mistake, or a change in conditions," may, at any time after notice of hearing, review any award made by it and modify or change it. In the first Sherratt case, *Sherratt vs. Rocky Mountain Fuel Co.*, 94 Colo. 269, 30 P. (2d) 270, the Commission on its own motion reopened the case after it had made a finding of complete recovery, had denied compensation, and had thereafter made a further finding that "there is no showing made of error, mistake or change in condition." It then reinstated a former finding of ten per cent disability and a former award for such disability, with no additional testimony before it and without assigning any reason for its reversal of opinion. We held that in such a case reasons for reversal were mandatory, and that no reasons appearing to indicate anything other than a mere change of mind on the part of members of the Commission such action was, so far as the record disclosed, a mere arbitrary exercise of power.

On review of the second case, *Rocky Mountain Fuel Co. vs. Sherratt*, 96 Colo. 463, 45 P. (2d) 643, after the decision by the court in the first case, we used the following language:

"April 2, 1934, the Commission, apparently on its own motion and for the purpose of considering possible error in its former award, or changed conditions, set a hearing for some two weeks later, which was continued on May 29, July 6, and August 7, following. Some testimony, including reports of physicians, was taken on each of said dates. Thereupon the cause was submitted and briefs filed and, September 21, 1934, the Commission affirmed its former award, finding no error, mistake or change in conditions, holding that the case would not be reopened, and that 'the claim for further compensation be and the same is hereby denied.'

"October 16, 1934, by supplemental award, the Commission found error in its former award against Sherratt, that he had in fact sustained a ten per cent permanent injury, that former awards in his favor should he reinstated, and that payments thereunder should be renewed as of the date when discontinued. It thereby reinstated its award of June 29, 1933, which the District Court had annulled, and which judgment we had affirmed in Sherratt vs. Fuel Company, *supra*. This it did on the identical evidence on which it held the contrary less than one month before, and with no finding save that 'after an exhaustive study of all the evidence herein' it was the opinion of the Commission 'that it committed error in its award.' This of course amounts to nothing more than a statement that the 'Commission has changed its mind.'"

In line with our holding in the first case, and quoting partly therefrom we said: "'Any supplemental award that would change, alter or modify the effect of the award of April 9, 1931, by which the claimant was found to have fully recovered from his injury, would require specific findings as to a change in this recovered condition.' In the same case we said: 'Reasons for findings are mandatory.' That statement applies to errors as well as changed conditions, and to it we now add that mere 'change of mind' with no statement of sufficient reasons therefor, is no compliance with the law."

On motion for modification of the opinion in the second case we said: "We are asked to modify the foregoing opinion to authorize the taking of further evidence and the entry of an award thereon, and the entry of an award, contrary to that of September 21, 1934, without the taking of further evidence, provided sufficient reasons therefor be stated by the Commission. Such questions not being before us we express no opinion thereon."

The case presents the exact question upon which we refused to pass, and which was raised by the motion to modify above noted. The Commission here states, as a reason for reversing its former opinion, the following: "Wherefore, the Commission now finds that on prior review it improperly weighed the evidence herein, and that its order of June 28, 1935, was in error and should be vacated, set aside, and held for naught."

We think the reason assigned is sufficient. In its former findings of no permanent disability and denial of compensation the Commission reserved jurisdiction in the following words: "And this Commission does hereby retain jurisdiction of this claim until the same is finally and fully closed."

When the letter of claimant calling attention to certain facts and testimony, was received, the Commission elected to consider it a petition to review its former award, and it recites in its supplemental award that it has reviewed the record *on petition of claimant*. The filing of such a petition is mandatory before the aggrieved party can have his case reviewed by the District Court. Section 4472, C. L. 1921, sec. 98 W. C. A., so far as here material provides: "No action, proceeding or suit to set aside, vacate or amend any finding, order or award of the Commission, or referee, or to enjoin the enforcement thereof, shall be brought unless the plaintiff shall have first applied to the Commission for a review as herein provided."

The statute does not say that additional testimony shall be taken on such review and we cannot read such requirement into it. The evident purpose of the section is to prevent court dockets from being cumbered with cases before the Commission has had full opportunity to correct its own errors. To hold that on such review the Commission is without power to do other than affirm its former finding and award would be to make the statute meaningless and a review futile. In *Industrial Commission vs. Employers Liability Assurance Corporation*, 78 Colo. 267, 241 Pac. 729, we held in effect that all awards of the Commission, until its final award, are merely tentative. The first award of the Commission in this case had not ripened into a final award by the expiration of the time within which the aggrieved party might petition for review. He wrote his letter and the Commission received it within that time and elected to consider it as a petition for review. With such petition pending the first award remained but a tentative finding in a matter over which the Commission still retained jurisdiction. Its duty as a fact finding body is to properly weigh the evidence in arriving at its conclusions. If the members of the Commission were convinced on further consideration of the evidence, after the petition to review their findings had been received, that they had "improperly weighed evidence," it was their duty, while the Commission had jurisdiction of the matter, properly to weigh the evidence, make findings of fact and enter an award in accordance with such findings.

For the reasons herein stated the judgment of the District Court is reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

MR. CHIEF JUSTICE CAMPBELL not participating.

INDUSTRIAL COMMISSION OF COLORADO and BEN ROSETTA vs. SCHAEFER REALTY COMPANY.

98 Colo. 445

I. C. 85801 **56 P. (2nd) 51** **Index No. 226**

BOUCK, Justice.

This case arises under the Workmen's Compensation Act. The employe, Rosetta, suffered a compensable injury. He filed a claim with the Industrial Commission, which, after a hearing, made an award in his favor. The employer, Schaefer Realty Company, carried the controversy into the District Court, contending that the claimant had lost his right to workmen's compensation by electing to bring, and by prosecuting to final judgment, an action at law for damages on account of alleged negligence of the employer in connection with the accident. The District Court sustained the contention and overruled the Commission. The claimant seeks a reversal.

The Workmen's Compensation Act was intended to supply every employe within its protection with a more or less summary and speedy procedure before the Industrial Commission to recover compensation for any injury from an industrial accident occurring in the course of his employment and arising out of it. Such recovery is without regard to the question whether or not the employer was guilty of such negligence as might otherwise have given rise to a cause of action at common law. It is not necessary to discuss certain exceptions to the general rule or the qualifications of it.

The employer, through non-rejection of liability under the Act, became subject thereto. W. C. A., Sec. 16 (C. L. '21, Sec. 4390, amended by S. L. '23, p. 733, Sec. 3). It is conceded by both sides that, when the employer thereupon failed to comply with the insurance features of the Act, the employe had the right to proceed, at his option, either under the Act or by a common law action for negligence. The employe brought an action of the latter sort directly in the District Court, but there the judgment went against him. He then attempted to fall back upon the procedure established by the Act.

The only question calling for decision is whether, under the facts and circumstances appearing in the record, there has been such an election of remedies by the employe as deprives him of the right to resort to the remedy offered by the Act when he has tried and failed to recover in an action at common law. The employer says "yes"; the employe says "no." Ours is the responsibility of determining which is right.

It is well known that the price paid for the speed and comparative certainty, under the Act, of recovering for industrial accidents irrespective of negligence or its absence is a much lower level of compensation as contrasted with the possible size of verdicts in common law actions based on the ground of negligence. Since the passage of the Workmen's Compensation Act, the industry must reimburse for compensable injuries within certain prescribed practical limits and wholly regardless of the question of negligence on the part of employe or employer or both. No discussion is required to demonstrate that the two remedies are radically different and inconsistent. The choice as between them must in all fairness be held to limit the claimant to the one chosen and be deemed to exclude the right to the other. 20 C. J., page 2, Sec. 1. We could not tolerate an employe's gambling with the remedy that promises contingently a much greater return, and then, if he loses, grant him the less fruitful one which was devised for his benefit with the obvious purpose of obtaining speedy and substantial security against what might otherwise be a total and irretrievable loss by an industrial accident.

The trial court was right.

Judgment affirmed.

MR. JUSTICE HOLLAND not participating.

IMPERIAL COAL COMPANY et al. vs. ROY HOLLAND and INDUSTRIAL COMMISSION OF COLORADO.

98 Colo. 448

I. C. 87233 **56 P. (2nd) 30** **Index No. 227**

YOUNG, Justice.

This cause comes here on writ of error from a judgment of the District Court sustaining a finding and award of the Industrial Commission in favor of the claimant, Roy Holland, for an admittedly compensable injury sustained by claimant in the coal mine of the Imperial Coal Company, one of the plaintiffs in error, herein referred to as the employer.

The only question involved is the proper method of determining the claimant's average weekly wage on the wage history shown by the evidence. His total earnings from his employment in the mine for the year preceding his accident were $899.16, a portion of which was earned during each calendar month in such year. While claimant was employed in the mine he was at the same time operating a small rented farm. His testimony concerning such farming operations is all that appears in the record on this point. In substance it is that he was farming an eighty-acre tract; that he was occupied on the farm when not working in the mine; that when there was employment to be had in the mine he worked there; that when there was none, he put in his time on his farm; also that he worked on the farm evenings and on Sundays; that this was general farm work such as any farmer similarly situated

would engage in. He further testified that he "figured" that he "put in equally as much time in the mine as the farm"; that if the actual hours employed were taken into consideration he spent more time on the farm than he did at the mine.

On this testimony the Commission found in part as follows: "During the year before the accident, claimant worked part of each month for the respondent employer, and during the same year operated a farm or ranch of 80 acres. He testified that he spent as much or more time working upon the farm than he did working in the mine.

"The Commission, therefore, finds: that the claimant was in business for himself for a period equivalent to six months of the year, and that his wages should be determined upon an average of twenty-six weeks. His total earnings were $899.16. His average weekly wages were $34.61."

These findings and the award made thereon were approved by the District Court and judgment entered accordingly.

The employer contends that the average weekly wage should be determined by dividing the total amount earned by claimant while working in the coal mine during the preceding year by fifty-two; while the claimant argues that it should be determined by taking one twenty-sixth of such amount.

The statute under which the average weekly wage of a claimant is to be computed is section 4421, C. L. 1921, as amended by section 2, chapter 186, S. L. 1929, which so far as pertinent, is as follows: "(B) The total amount earned by the injured * * * employe in the twelve months immediately preceding the accident shall be computed, which sum shall be divided by fifty-two, and the result thus ascertained shall be considered as the average weekly wage of said injured * * * employe, for the purpose of computing the benefits provided by this Act, except as hereinafter provided.

"(C) Provided, however, that in any case where the employe has been ill, and unable to work in consequence of such illness, or has been in business for himself during the twelve (12) months immediately preceding the accident, his average weekly earnings shall be computed by dividing the total amount earned during such twelve (12) months by the sum representing the difference between fifty-two (52) and the number of weeks during which such employe was so ill or in business for himself."

Under the rule laid down in Danielson vs. Industrial Commission, 96 Colo. 522, 44 P. (2d) 1011, the judgment of the District Court approving the findings and affirming the award of the Industrial Commission must be affirmed. The claimant in that case was engaged in business for himself as a painting contractor. On three different occasions during the year he worked for another firm, on one occasion for three days, on another for four days and on still another for three days. On the last occasion he sustained an injury, which caused his death. We held in that case, the usual working week in the painting trade being five days, that he worked two weeks for his employer and was in business fifty weeks for himself; that the number of weeks during which he was in business for himself during the year preceding the accident should be deducted from the total number of weeks in the year and his average weekly earnings determined by dividing the total amount earned by the remaining number of weeks. The case before us differs from that case in no essential respect. The Commission found that during six months of the year preceding claimant's accident he was engaged in business for himself, working for his employer the balance of the year, and on such finding computed the average weekly wage to be one twenty-sixth of the total amount earned during the year. The method of determining the average weekly wage of employes is fixed by statute, and the judgment of the District Court approving the Commission's findings is in accordance with a proper construction on the statute.

Judgment is affirmed.

MR. JUSTICE BOUCK not participating.

LEYDEN LIGNITE COMPANY et al. vs. JOE BUDDY and INDUSTRIAL COMMISSION OF COLORADO.

98 Colo. 452

I. C. 79436 **56 P. (2nd) 52** **Index No. 228**

BURKE, Justice.

This is a workmen's compensation case. The parties are hereinafter referred to as the Lignite Company, the Insurance Company, Buddy, and the Commission, respectively.

Buddy, while employed by the Lignite Company, whose industrial insurance was carried by the Insurance Company, sustained an injury in an accident arising out of and in the course of that employment. The referee found: Date of injury August 25, 1933; temporary disability ended March 16, 1935; permanent disability 50 per cent loss of right leg at ankle, 35 per cent loss of right arm at wrist; and average weekly wages $24.30. He awarded compensation at $12.15 per week from September 5, 1933, to March 15, 1935, and for 88.4 weeks thereafter (or until approximately $1,074 had been paid). On review the Commission found and awarded the same, save that instead of finding the per cent of loss to members separately it found a "permanent partial disability equivalent to 20 per cent as a working unit" and instead of the weekly allowance for 88.4 weeks after March 15, 1935, it provided that payments be made after that date "until the further sum of $3,640 shall have been paid." The Lignite Company and the Insurance Company brought this

action in the District Court to set aside the Commission's award. The court, however, affirmed it, and to review that judgment this writ is prosecuted. It is here contended that the award of the Commission was made under a statute not applicable; further, that if said statute be applicable, the award is unsupported by the evidence; hence that the Commission acted without and in excess of its powers.

Section 73 of the Act in question reads, in part:

"In case an injury results in a loss set forth in the following schedule, the injured employe shall, in addition to compensation to be paid for temporary disability, receive compensation for the period as specified, to-wit: * * *.

"The loss of a hand at the wrist 104 weeks; * * *.

"The loss of a foot at the ankle 104 weeks."

Subdivision (f) of the same section provides that in case of loss or partial loss of the *use* of a member compensation "may" be determined by comparative estimate, or the Commission "may award compensation under the permanent partial disability section," which is section 78. This covers the instant case unless excluded by the provision reading, "except the sustaining of any one of the injuries *specifically* covered by sections 73, * * *." Briefly stated, the question is: Does "injuries specifically covered by section 73" refer only to loss of a member, or does it refer also to loss or partial loss of the *use* thereof? The Lignite Company and the Insurance Company say the latter, Buddy and the Commission the former.

A careful reading of these sections in full convinces us that reason and logic support the conclusion of the Commission and the court. This is enforced by the well recognized rule of construction that, if possible, some meaning and effect must be given to each word used in the statute in question. If, here, we delete the word "specifically" the exclusion clause in section 78 would mean exactly what plaintiffs in error say it does. We cannot escape the conclusion that the General Assembly used the word to limit the exclusion clause to that portion of section 73 relating to loss of a member, not that portion relating to loss of use. In this case the loss being of use the Commission was vested with discretion to apply section 78, which discretion it so exercised. We here get no material assistance from cases in this jurisdiction but the following are enlightening and support our conclusion.

Norwood vs. Lake Bisteneau Oil Co. 145 La. 823; 83 So. 25.

Close vs. Lucky O. K. M. Co. 105 Kan. 257; 182 Pac. 392.

No good purpose could be served by abstracting the evidence. Suffice it to say we have examined it with care and have no doubt it supports the award of the Commission.

The judgment is accordingly affirmed.

MR. CHIEF JUSTICE CAMPBELL and MR. JUSTICE HOLLAND concur.

STATE COMPENSATION INSURANCE FUND and W. A. ELLIS, INC. vs. INDUSTRIAL COMMISSION OF COLORADO, LARS NERIM, et al.

98 Colo. 563

I. C. 88117 **58 P. (2nd) 759** **Index No. 229**

BURKE, Justice.

This is a workmen's compensation case and the sole question is: Did the accident arise out of and in the course of deceased's employment?

The State Compensation Insurance Fund is hereinafter referred to as the fund, W. A. Ellis, Inc., as the company, The Industrial Commission of Colorado as the Commission, the other defendants in error as claimants, and Ira Nerim, deceased, as Nerim.

The company, which carried its industrial insurance with the fund, operated a mine near Alma, Colorado. Deceased was there employed by it and he and some of his companions were sleeping in its bunkhouse. During the night this building caught fire and therein Nerim incurred the burns which caused his death. Claim was made for compensation under the act and allowed by the referee and the Commission. To review that award this action was instituted in the District Court, whose judgment affirmed it. To review that judgment this writ is prosecuted. It is said in the brief of plaintiffs in error that the exact question here involved has not been decided in this jurisdiction and that other cases growing out of the same accident await the decision of this.

The general rule is admittedly stated in 71 C. J. sec. 437 p. 695. The particular fact which it is contended excludes this case from its operation is that while deceased was obliged as a condition of his employment to sleep in the bunkhouse, board and room there were not *furnished* by the company, but he was charged $1.25 per day therefor.

The Commission found, and it is undisputed, that deceased and his companions were obliged to room and board at the bunkhouse as a condition of their employment. This was not only a company regulation, but a matter of stern necessity enforced by the location of the company's mine and the total absence of other available accommodations. The rule above states that "the test is whether or not the workman is given a choice in the matter." Nerim

had none. Other authorities stating the rule, or whose reasoning supports the conclusions of the Commission and the court, are:

Holt Lumber Co. vs. Industrial Comm. 168 Wis. 381; 170 N. W. 366.

Landeen vs. Toole County Refining Co. 85 Mont. 41; 277 Pac. 615.

Ocean Accident & Guarantee Corp. vs. Pallero 66 Colo. 190; 180 Pac. 95.

The judgment is affirmed.

FELIX L. BUKOWICH, et al. vs. THE FORD MOTOR COMPANY, et al.

99 Colo. ....

I. C. 83921 **59 P. (2nd) 470** **Index No. 230**

BOUCK, Justice.

This case arises under the Workmen's Compensation Act.

Bukowich, the claimant, plaintiff in error here, asks us to reverse the judgment of the Denver District Court which vacated an award of compensation by the Industrial Commission in his favor and against the Ford Motor Company, and ordered a dismissal as to that company and its insurance carrier, the Travelers Insurance Company.

Originally the proceedings were instituted by Bukowich against Mansfield Motors, Inc., as employer. He plainly regarded himself as an employe of that corporation, to which for brevity's sake we shall hereafter generally refer as "Mansfield." Later the Ford Motor Company was made a respondent, as was its insurance carrier. Mansfield carried no employer's liability insurance. Of course if the evidence should prove Bukowich to have been the employe of the Ford Motor Company, his own ignorance of the fact would not of itself prevent his being entitled to compensation from that company.

The evidence introduced before the referee of the Commission shows that at the time of the accident in question Mansfield was engaged among other things in selling Ford automobiles in and near Glenwood Springs, Colorado, under a written agreement with the Ford Motor Company discussed below. The claimant had been employed by Mansfield to do certain work in connection with its business at Glenwood Springs. His usual duties were to wash and service cars and to do other general work about the Mansfield garage. Early on the morning of May 15, 1934, the claimant drove to Denver with the manager of Mansfield in a car owned by that company, for the purpose of driving back a Ford truck which had been bought by Mansfield from the Ford Motor Company. On the evening of the next day the two men left Denver for Glenwood Springs, the claimant driving the newly purchased Ford truck and the manager driving the car in which they had come to Denver. About 3 a. m. on May 17, approximately three miles from Glenwood Springs, the claimant fell asleep at the wheel. The truck left the road and ran into the Colorado river, the claimant being seriously injured. He contends that he was injured while acting in the course of his employment for Mansfield and further that under the terms of the Act he was an employe of the Ford Motor Company and consequently entitled to compensation from the Ford Company and its insurance carrier. In opposition to the contention that the claimant was the employe of the Ford Motor Company, the latter points out the uncontradicted evidence that his own notice and claim for compensation filed with the Commission stated his employer to be Mansfield Motors, Inc.; that he repeatedly stated at the hearing he was the employe of this company; that his wages were paid by the latter and not by the Ford Motor Company; and that his work was directed exclusively by Mansfield Motors, Inc.

Was Bukowich nevertheless the employe of the Ford Motor Company under the Workmen's Compensation Act?

To answer this question we must analyze the relations existing between Mansfield Motors, Inc., and the Ford Motor Company.

The contract between these two corporations, which was introduced in evidence, reads in part as follows:

> "(1) Company (i. e. the Ford Motor Company) agrees to sell and Dealer (i. e. Mansfield Motors, Inc.) agrees to purchase Ford automobiles, trucks, chassis, automobile bodies, pick-up bodies, truck bodies, cabs, accessories and parts (hereinafter sometimes collectively referred to as Company's 'Products') upon the terms, conditions and provisions hereinafter specifically set forth and subject to the right reserved to Company to sell to other Dealers and direct to retail purchasers in any part of the United States without obligations for any commission to Dealer on any such sale.
>
> "(7) Dealer agrees specifically as follows:
>
> "(a) To maintain a place of business (and only one place of business unless service station is separate from sales room) suitably located and equipped as sales room and service station and acceptable to company; to conspicuously display effective signs; to carry an adequate stock of genuine Ford parts; to install and maintain tools and machinery in said service station as recommended by Company; to employ competent salesmen; and to make repairs in a workmanlike manner on products of Company whether sold by Dealer or not.

"(h) Not to use the words 'Ford,' 'Fordson' or 'Lincoln,' or any other trade-mark or trade name adopted by Company, as a part of Dealer's firm name or trade name.

"(9) It is further mutually agreed that:

"(b) Dealer has no authority to make any representation concerning, or on behalf of, Company nor to make any warranty concerning its products, nor in any manner to assume or create obligations on behalf of Company, nor in any manner to act as its agent. Dealer shall at all times permit company's representative to have access to Dealer's place of business to ascertain the adherence of Dealer to the above and to all other provisions of this agreement.

"(c) This agreement may be terminated at any time at the will of either party by written notice to the other party given either by registered mail or by personal delivery, and such termination shall also operate to cancel all orders theretofore received by Company and not delivered.

"(h) The terms of this agreement may not be enlarged, varied, modified or cancelled by any agent or representative of Company, except by an instrument in writing executed by the President, Vice President, Secretary, or Assistant Secretary of Company, and Company will not he hound by any alleged enlargement, variation, modification, or agreement not so evidenced."

The foregoing contract was obviously interpreted, applied, and acted upon by both parties according to its express terms.

As fairly stated by counsel for the Ford Motor Company:

"Mansfield Motors, Inc., although selling Ford products, was in no sense a dealer exclusively in these products. In addition, this Company ran a general garage and storage business for all makes of cars; it handled Conoco gasoline and displayed Conoco signs; it sold products of the Gates Rubber Company, including tires and fan belts, and it displayed signs advertising these products; it handled pyroil and advertised its sale of this product; it sold some Chevrolet parts and other general automobile accessories."

Moreover, Mansfield did not ever or anywhere display the name Ford Motor Company. It handled no products owned by the latter company. The Ford products—both automobiles and accessories—were purchased outright. They were paid for by Mansfield either in cash on delivery or within sixty days after purchase and in the usual course of business. The fatal truck in this case was paid for in cash at delivery in Denver and the legal title thereof became absolutely vested in Mansfield. The Ford Motor Company had no financial investment in Mansfield. This operated on its own responsibility. It leased its building, owned the entire equipment, and paid the salaries and expenses of its employes. We are not impressed by the argument that Mansfield Motors, Inc., is to be regarded as the employe or agent of the Ford Motor Company for the alleged reason that this company issued list prices of its products on resale or exercised control over the former's business operations. The manufacturer had the right to fix prices for resale and to urge its dealers to abide thereby. It also had a right to define and prescribe those conditions which it deemed most conducive to the successful retailing of its products and to the supplying of needed repairs and service to those already owning Ford cars so as to make the use of those cars more attractive because of the availability, completeness, and efficiency of the recommended tools, materials and methods. It is clear that these conditions were such as were reasonably desirable from the standpoint both of the Ford Company as manufacturer and of Mansfield as retail dealer, with the probable result of bringing about larger and speedier retail sales, of causing the greatest possible satisfaction to the retailer's customers, and of increasing profits and prosperity for wholesaler and retailer alike in the usual channels of disposition for manufactured products. By no legitimate inference from the facts as presented by the record before us can we find the Ford Motor Company to be a corporation "operating, engaged in or conducting a business by * * * contracting out any part or all of the work" thereof to Mansfield Motors, Inc., within the meaning of section 49 of the Act.

We therefore hold that Bukowich was not an employe of the Ford Motor Company, and that the judgment of the District Court adjudging the Ford company not liable for compensation was right.

Judgment affirmed.

THE CENTURY INDEMNITY COMPANY vs. HERMAN KLIPFEL et al.

99 Colo. ....

I. C. 71881, 73541 **61 P. (2nd) 842** **Index No. 231**

YOUNG, Justice.

This is a workmen's compensation case. Claimant Klipfel was an employe of the Ashley Lumber Company working as a logging foreman. August 5, 1931, as it is alleged, he strained his back while engaged in his employment resulting in the disability around which this controversy centers. The Century Indemnity Company carried compensation insurance for the Ashley Lumber Company. It filed an admission of liability to pay compensation for temporary disability and for such permanent disability as might thereafter be determined. The claimant returned to work nineteen days after the accident. December 16, 1931, the In-

dustrial Commission by its referee found that the temporary disability ended August 22nd and made an award accordingly. No petition to review this award was filed by the claimant, the employer or the Century Indemnity Company.

November 3, 1931, claimant sustained a second accidental injury and filed his claim for compensation. At that time the Travelers Insurance Company carried the compensation insurance for the Ashley Lumber Company. The Travelers Company filed its admission of liability to pay compensation for temporary disability and for such permanent disability as might thereafter be determined. It paid temporary disability compensation and in due course of time the matter was set for hearing on the question of permanent disability. February 17, 1933, and before the hearing, the attorney for the Travelers Insurance Company wrote the Commission suggesting that the evidence on the hearing would show that the permanent disability, if any, was attributable not only to the accident of November 3, 1931, but also to the accident of August 3, 1931. Upon receipt of this letter the Commission caused the Century Indemnity Company to be brought into the case, and after hearings in which additional testimony was taken, made its finding that "his (claimant's) permanent disability by reason of both accidents is 10% as a working unit, and the permanent disability due to each of the accidents cannot be segregated but must be charged jointly to both accidents." It fixed the amount of compensation and ordered that one-half be paid by the Century Indemnity Company and one-half by the Travelers Insurance Company. This finding and award was sustained by the District Court which entered its judgment for claimant. The Century Indemnity Company brings the cause here on writ of error.

While the cause was pending in the District Court the Travelers Insurance Company and the claimant entered into a stipulation for payment in a lump sum of the amount assessed against the company. The stipulation was filed in court and upon its motion and over the objection of the Century company the cause was dismissed as to the Travelers Company. This motion over objection of the Century Indemnity Company was sustained.

The Century Indemnity Company assigns as error:

1. That the District Court erred in affirming the final award of the Commission. 2. That the evidence was insufficient to support a modification of the award of the Commission for compensation for temporary disability arising out of the first accident and finding no permanent disability arising out of that accident. 3. That the Industrial Commission was without jurisdiction to modify the award on the first accident in the absence of specific findings based on evidence of a mistake or change of conditions with respect to such award. 4. That the court erred in sustaining the motion to dismiss as to the Travelers Insurance Company, over the objection of the plaintiff in error, the Century Indemnity Company.

We shall first consider the last assignment of error, which we think is not well taken. We know of no rule of law which prevents any party to a judicial proceeding, against whom a several award or judgment has been entered, from accepting that award or judgment as final and making a settlement thereon. Here such settlement and the dismissal of the Travelers company from the case cannot and will not be permitted to prejudice the plaintiff in error in this court or in any rehearing or other proceedings that may hereafter be had.

Before the hearing on the question of permanent disability caused by the last accident, the attorney for the Travelers Insurance Company advised the Commission that on the hearing testimony would be introduced to the effect that the permanent injuries, if any, sustained by claimant would be shown to be in part attributable to the accident of August 5, 1931. This in effect called the Commission's attention to the asserted fact that it had made a mistake in its award of December 16, 1931, based on the first accident. While the Commission might have considered such evidence when produced, merely in bar pro tanto of the liability of the Travelers Insurance Company, and if convinced that it had made a mistake in its former award on its own motion could have ordered a rehearing on the ground of mistake in the original award, nevertheless it was acting within its jurisdiction and providing for an expeditious determination of the controversy in bringing the Century Indemnity Company in as a party to the hearing, in order that relief might be granted to claimant against its mistake in the award of December 16, 1931, if the evidence should disclose that such a mistake had been made. Section 4484, C. L. 1921, clearly provides for a review of any award by the Commission upon its own motion. That statute is as follows: "Upon its own motion on the ground of error, mistake, or a change in conditions, the Commission may at any time after notice of hearing to the parties interested, review any award and on such review, may make an award ending, diminishing, maintaining or increasing the compensation previously awarded, subject to the maximum and minimum provided in this Act, and shall state its conclusions of facts and rulings of law, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys already paid." See *Employers Mutual Ins. Co. vs. Industrial Commission*, 83 Colo. 315, 265 Pac. 99.

Plaintiff in error, the Century Indemnity Company relies on our opinion in *Rocky Mountain Fuel Co. vs. Sherratt*, 96 Colo. 463, 45 P. (2d) 643, as authority sustaining its contention that it was error for the Commission, on its own motion, to change its award of December 16, 1931, based on the first accident. In the Sherratt case the Commission modified and changed its final award. With respect to its action in so doing we said: "This it did on the identical evidence on which it held the contrary less than one month before, and with no finding save that 'after an exhaustive study of all the evidence herein,' it was the opinion of the Commission 'that it committed error in its award.' This of course

amounts to nothing more than a statement that 'the Commission has changed its mind.'"

In the instant case the commission did not act in the matter of changing its award until after it had heard additional evidence. This distinguishes it from the Sherratt case and brings it within the rule of *Rocky Mountain Fuel Co. v. Canivez*, 96 Colo. 198, 40 P. (2d) 618, in which we used the following language: "By a reconsideration, the commission might well have found that it had improperly weighed this evidence; *but in addition thereto, witnesses were examined,* reports reviewed and there was ample opportunity for the commission to abandon its former conviction. We must assume—in the absence of any showing of fraud—that the commission itself was satisfied that it had made a mistake; and considered that it was its plain duty to correct the same, and we are not prepared to say that there was no substantial evidence to support such a change of opinion." (Italics ours.)

In *Rocky Mt. Fuel Co. v. Sherratt, supra,* we quoted from *Sherratt v. Rocky Mt. Fuel Co.*, 94 Colo. 269, 30 P. (2d) 270 (this case having been twice before the court) and said: "'Any supplemental award that would change, alter or modify the effect of the award of April 9, 1931, by which the claimant was found to have fully recovered from his injury, would require specific findings as to a change in this recovered condition.' In the same case we said: 'Reasons for findings are mandatory.' That statement applies to errors as well as changed conditions, and to it we now add that mere 'change of mind' with no statement of sufficient reasons therefor, is no compliance with the law."

In the instant case in the final award of the commission based on a hearing on the claim for compensation for the second accident, and upon a rehearing on the claim for compensation for the first accident, it does not set aside or mention the finding of its referee in the first case, that there was no permanent disability arising out of the first accident, but it does specifically find that there was a permanent injury resulting in a ten per cent disability of the claimant attributable to both accidents. In so finding, we think there was a compliance with the spirit of the rule announced in the first Sherratt case, to the effect that a statement of reasons for a modification of an award is mandatory. We can conceive of no clearer case of mistake than one in which the commission makes a finding of no permanent injury and denies compensation, when in fact a permanent injury has been sustained which would entitle the claimant to compensation if the facts had been known, established and correctly acted upon. The Commission found permanent injury attributable to the first accident and so held in its findings and award here questioned. Such findings to be legal must of course be based upon evidence, and this brings us to a consideration of the question of whether the evidence here was sufficient to support the final award of the commission based upon the finding that there was a permanent injury sustained by claimant attributable to both accidents, and the requirement that one-half of the total award be paid by each of the insurance carriers.

We have too often held, to require citation of authorities, that the finding of the commission based on conflicting evidence is binding on courts of review. One notable instance of such holding is to be found in *Employers Mutual Insurance Co. v. Industrial Com., supra.*

The medical testimony is sufficient to sustain the finding of the commission that the claimant was suffering a ten per cent disability as a working unit by reason of these two accidents. Dr. Norman testified that it was his opinion that each accident aggravated the existing condition with which claimant was born. We think his testimony justifies the finding of the commission that the ten per cent disability was attributable to both accidents.

We are not unaware of the fact that liability of each of the two insurance carriers here involved to pay compensation is a contractual liability and that it is a several and not a joint obligation. We further are mindful of the provisions of the compensation act found in Section 4399, C. L. 1921, (Sec. 25 W. C. A.) which is in part as follows: "Every contract insuring against liability for compensation or insurance policy evidencing the same, must contain a clause to the effect that the insurance carrier shall be directly and primarily liable to the employe, and in the event of his death, to his dependents, to pay compensation, if any, for which the employer is liable, thereby discharging to the extent of such payment the obligations of the employer to the employe that, as between the employe and the insurance carrier, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier that jurisdiction of the employer shall, for the purpose of this act, be jurisdiction of the insurance carrier, and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer under the provisions of this act." It will be observed that this statute provides for the payment by the insurance carrier of compensation "for which the employer is liable, thereby discharging to the extent of such payment the *obligation of the employer* to the employe." (Italics ours.)

Section 4401, C. L. 1921, provides that if the employer shall not have complied with the insurance provisions of the act, an injured employe may claim the compensation and benefits provided by the act and in such case the amounts of compensation specified shall be increased fifty per cent. Since the evidence is clear that there is a permanent injury and disability attributable to both accidents, it follows that if the employer had not taken insurance he would be liable for such disability as resulted from the concurring effects of the two accidents. No difficulty would have arisen under the evidence had the same

insurer carried the risk at the time of the occurrence of both accidents. A reasonable construction of the two sections of the statute mentioned is, that it was the policy of the legislature to place the obligation to pay compensation in the first instance on the employer. For reasons of policy which we need not consider, but which readily suggest themselves, the legislature further saw fit to provide for insurance of employers' liability to pay compensation and to require that the insuring company assume a primary liability to an injured employe. While in this case one of the insurance carriers has accepted the award and made payment, it might with equal force have made the same objections to the insufficiency of the evidence to fix its proper proportion of the award, as are here made by the plaintiff in error. If we were to hold such objections good, we should have a situation in which an employe has sustained permanent injuries in two accidents while working for the same employer, resulting in a ten percent permanent disability, but unable to recover compensation because he could not definitely apportion the amount of disability attributable to each accident.

We think it is the policy of the Workmen's Compensation Act to at all times hold the employer primarily liable to the employe for disability proximately resulting from accidents arising out of and in the course of the employment. We are fortified in this conclusion by the provision of section 4399, supra, that payments by the insurer discharge "to the extent of such payment the obligations of the employer to the employe." It was not within the power of the employee to require the employer to insure in one company, nor was it within his power to prevent the employer from insuring in two companies; but it was within the power of the employer and the two insurance companies to provide, as they might deem advisable, against just such a contingency as has here arisen. The commission, as a fact-finding body, has exercised its best judgment in assessing the payment of this award against the two companies equally, basing its judgment probably upon the question asked of Dr. Norman, "Would you charge this to either one of the accidents or would it be your opinion that the permanent disability should be divided between the two?" and his answer in part: "I think it would be impossible to separate the disability as between the two accidents." There being sufficient evidence to sustain the finding of a ten per cent permanent disability by the commission and as resulting from the concurring effects of the two accidents, and the evidence likewise disclosing a mistake on the part of the commission in finding no permanent disability caused by the first accident, we are not disposed to disturb the award equally apportioning the burden between the two respondent insurers. The employer paid each of them to indemnify him against liability for accidental injury to this claimant. Presumably both insurers are financially responsible. Each has contracted to indemnify the employer for a portion of a disability caused by two accidents for which the employer is unquestionably liable.

The rights of the employer and the two insurers inter se are not involved in this action other than collaterally. As between themselves we leave them to settle their problems as they may be advised.

The judgment is affirmed.

MR. JUSTICE BOUCK, dissents.

On Petition for Rehearing

MR. JUSTICE BOUCK, dissenting:

After a full hearing the Industrial Commission found the claimant, Klipfel, entitled to compensation for *temporary* disability caused by an industrial accident on August 5, 1931.

It also found—upon the uncontradicted evidence of the claimant and his physician—that no permanent disability had resulted. No petition for review was filed by either side and the commission's order therefore became final under section 95 of the Workmen's Compensation Act (C. L. 1921, sec. 4469, as amended by S. L. '23, p. 755, sec. 4). Moreover, the compensation awarded was duly paid.

The claimant having sustained a second and wholly disconnected accident on November 3, 1931, the commission ordered a hearing thereon. The same employer was involved, but the insurance carrier had in the meantime been changed. *At the suggestion of the new insurance carrier the case involving the first accident was reopened.* Not only so, but *the two cases were then heard together.* Incidentally, it is to be noted that at the hearing in the first case the second accident had already taken place and was directly mentioned by the witnesses. After the second hearing the commission entered in the first case a supplemental award for half the compensation granted for the permanent disability alleged to have been caused by both accidents combined. In the second case an award for a like half was entered.

I am unable to agree with the judgment and opinion of the court herein sustaining the foregoing procedure and approving the supplemental award thus entered in the first case. My reasons include the following:

(1) The order in the first case having become a final adjudication between the parties upon a full and fair hearing, the reopening of that case could not be lawfully accomplished except under section 110 of the Workmen's Compensation Act (C. L. 1921, sec. 4484). This section provides: "Upon its own motion on the ground of error, mistake or a change in conditions, the commission may at any time * * * review any award * * *." There is no evidence whatever in the record or files as to any "error, mistake or change in conditions" here, within any reasonable interpretation of the statute. At the second hearing the

additional evidence on disability consisted of expert testimony by a physician who examined the claimant about a year after both accidents had occurred. He did not purport to know anything concerning these accidents except as a matter of professional opinion.

The facts appearing in, and the principle laid down by, the case of *Independence Coffee and Spice Co. v. Taylor*, 97 Colo. 242, 48 P. (2d) 798, may well give us pause ere we lightly set aside a final award duly paid in full. Expert evidence should not be allowed to change an honest award by mere opinion, except in extraordinary circumstances not here present. It is noteworthy that, when we have permitted reopenings by the commission to stand, the commission has perhaps without exception given notice of hearings to be held "to determine whether there had been any error or mistake in the previous award, or any change in the claimant's condition." *Reynolds v. Fraker Co.*, 94 Colo. 84, 28 P. (2d) 338; *Clayton Co. v. Zak*, 94 Colo. 171, 29 P. (2d) 374; *Sherratt v. Fuel Co.*, 94 Colo. 269, 30 P. (2d) 270. Compare *Rocky Mt. Co. v. Sherratt*, 96 Colo. 463, 45 P. (2d) 643. Such a notice was not given in the case at bar.

Mr. Justice Young's opinion says: "We can conceive of no clearer case of mistake than one in which the commission makes a finding of no permanent injury and denies compensation, when in fact a permanent injury has been sustained which would entitle the claimant to compensation if the facts had been known, established and correctly acted upon." This seems to imply the propriety of multiple hearings in all cases, with both sides racing to gather a little more evidence for the next re-trial. It is readily seen that the broad doctrine so announced would invite a continually repeated reopening of cases, frequently at the instance of an endless procession of insurance carriers succeeding one another, attempting to avoid liability by throwing the burden upon their predecessors and thus gambling upon the chance of getting the commission to change its mind. The embarrassment and the danger attending such reopenings, especially when an independent industrial accident has intervened, as it has here, would result in perpetual uncertainty for employe, employer and insurer alike, the diametrical opposite of the simplicity intended by the Workmen's Compensation Act. But here another complication added to the difficulties by providing a joint hearing on two disconnected accidents. As a general rule, all parties are entitled to a trial of their case to the exclusion of and apart from trials of legally separate cases involving other causes of action, whether similar or not. It seems to me that the conditions here clearly demanded single, undiverted attention. Certainly the issue of "error," or "mistake," could have been better determined in a hearing not bound up with an entirely separate cause of action.

(2) As for such "change in conditions" as will justify a reopening, this must necessarily be a change in the conditions resulting from the particular accident and not a change due, as here, entirely to a subsequent and independent accident. The latter is the case here, hence it is clear that "change" was not here involved. It is not even claimed here, according to the record before us. Great liberality should be shown in re-opening whenever a change does occur in conditions created by the basic accident, where the change occurs without the intervention of an independent cause.

(3) From what I have said it will properly be inferred that I dissent largely because of this court's approval of what all must admit is a strangely anomalous, complex and confusing procedure. We have before us two separate claims, for which the same employer is liable to the full extent, but for each of which only one of the two insurance carriers can, under any known rule of legal liability be liable. Yet this court approves the mingling of the two. I know of no accepted doctrine of liability which seems strangely like *argumentum ad hominem* by saying, as does the majority opinion herein: "It was not within the power of the employe to require the employer to insure in one company, nor was it within his power to prevent the employer from insuring in two companies; but it was within the power of the employer and the two insurance companies to provide, as they might deem advisable, against just such a contingency as has here arisen. The commission, as a fact-finding body, has exercised its best judgment in assessing the payment of this award against the two companies equally, basing its judgment probably upon the question asked of Dr. Norman, 'Would you charge this to either one of the accidents or would it be your opinion that the permanent disability should be divided between the two?' and his answer in part: 'I think it would be impossible to separate the disability as between the two accidents.'" Nowhere in the record before us is there, by any reasonable interpretation, any other evidential basis than this—which is no recognized basis at all—for the result achieved. Not even the wildest guess was made, by any witness, as to the ratio of the respective disabilities from the two independent accidents as a criterion for compensation liability of the individual insurance carrier. There has been, I fear, a palpable translation of the judicial process into the realm of unfounded speculation. To that I cannot give my assent.

(4) The unsoundness of the decision seems to me best indicated by its own closing words, again including what strongly resembles *argumentum ad hominem*: "The employer paid each of them to indemnify him against liability for accidental injury to this claimant. Presumably both insurers are financially responsible. Each has contracted to indemnify the employer for a portion of a disability caused by two accidents for which the employer is unquestionably liable. The rights of the employer and the two insurers inter se are not involved in this action other than collaterally. As between themselves we leave them to settle their problems as they may be advised."

Would any attorney harbor a hope, on the strength of this pronouncement, to institute an action on behalf of the original insurance carrier for the "settling" of "problems" arising out of the "rights of the employer and the two

insurers inter se"? When such an action comes to this court, will the judges who concur in the majority opinion stand by this declaration?

I respectfully submit that this judgment herein should have been reversed and the case remanded to the district court with instructions to send it back to the Industrial Commission, directing that body to dismiss it as to the plaintiff in error; inasmuch as the award entered against the other insurance carrier is shown by the record to have been settled by stipulation between itself and the claimant, without consulting the plaintiff in error carrier, which, as above indicated, was an involuntary party to the joint hearing purporting to deal with two separate accidents inextricably intermingled thereby. Only an unconditional dismissal of the proceedings could have done justice to the plaintiff in error in the actual state of the record.

LONDON GUARANTEE AND ACCIDENT CO., LTD., a Corporation, and RAVEN HILL MINING AND LEASING ASSOCIATION, a Corporation, Plaintiffs in Error, vs. JOHN SHIREMAN and INDUSTRIAL COMMISSION OF COLORADO, Defendants in Error.

I. C. 26248 **July 6, 1936** **No. 13908**

Error to the District Court of the City and County of Denver.

HON. JAMES C. STARKWEATHER, Judge.

Judgment affirmed without written opinion.

In Department.

THE SECURITY STATE BANK OF STERLING et al. vs. OLIVE W. PROPST and INDUSTRIAL COMMISSION OF COLORADO.

99 Colo. ....

I. C. 82804 **59 P. (2nd) 798** **Index No. 232**

YOUNG, Justice.

This is a case in which the widow of a deceased employe filed with the Industrial Commission a claim for compensation under the provisions of the Workmen's Compensation Act. The claim was allowed and compensation awarded by the commission. Subsequently suit was instituted in the district court by the employer and insurer to vacate the award, which action resulted in a judgment for claimant. This judgment is before us for review on writ of error.

The parties will be designated as the bank, which is the employer, the insurer, the claimant and the commission, while claimant's husband will be mentioned by name, Propst, as the husband or as deceased.

The evidence is contained in stipulations of the parties from which we glean the following facts:

Claimant's husband was assistant cashier of the bank at Sterling, Colorado. He formerly had been connected with a bank at Merino, a town located twelve miles from Sterling, which bank had been absorbed by the Sterling bank. For some three years Propst had lived in Merino, had driven his auto to work each day, and the first year was allowed mileage for the trips to and from his home. This allowance, however, had been discontinued a considerable time prior to the accident here involved as a matter of economy. According to the statement of the president of the bank, "Mr. Propst frequently brought deposits from Merino and this act was in accordance with a custom followed in connection with bank affairs for the convenience of Merino depositors."

On the morning of May 24, 1934, deceased had received money from two of the bank's customers in Merino for deposit and with a young lady as a guest, proceeded in his car from Merino to Sterling. Upon arriving in Sterling he stopped his car in front of the post office, stating to his guest that he had forgotten to mail a letter in Merino; thereupon the young lady received the letter, got out of the car and went into the post office to mail it. The record does not disclose whether or not she intended to ride further with Propst. About a month prior to this time deceased had procured from the sheriff a permit to carry a revolver, and although the permission was not procured by direction of the bank officers they knew of it shortly after Propst was given the permit. When the young lady alighted from the car Propst's revolver was lying on the seat, and he picked it up to place it in the pocket of the car, when it was accidentally discharged, the bullet striking him in the right leg below the knee, passing through the leg and injuring the great toe of the left foot. He was taken to a hospital where he died June 9th following.

It is conceded that the sole issue here involved is whether decedent's accident arose out of and in the course of his employment, and the error assigned being the holding of the district court that it did.

The bank and the insurer contend that in receiving money for deposit and bringing it to the bank, decedent was not performing services arising out of and in the course of his employment, but was acting merely as agent of the several depositors. In support of this contention they quote section 6703, C. L. 1921, which provides that "Every bank shall be conducted at a single place of business, and no branch thereof shall be maintained elsewhere."

They also cite cases upholding the proposition that a bank is not liable for deposits received by an officer or an employe elsewhere than at its place of business and in any event not until such deposits are actually made and placed to the credit of the depositor. This question we do not decide, because, assuming the correctness of statement, we do not consider an answer determinative of this case.

It will be observed from the quoted excerpt from the statement of the bank's president, that these deposits were brought from Merino by the deceased "in accordance with a custom followed in connection with bank affairs." The attorneys for the bank and the insurer contend that this statement does not show the custom originated with or was adopted by the bank, but simply that it was a custom adopted or followed by Mr. Propst. They further contend that the words "in connection with bank affairs" have no significance other than to exclude the inference that the decedent undertook all sorts of missions for his Merino neighbors. If susceptible of this construction we think it equally susceptible of the construction placed upon it by the commission that it was a custom of the bank. In fact, the commission's construction seems to us to be entirely logical, for what an employe does in connection with bank affairs might with reason be assumed to be within the knowledge of the president of the bank, but what his custom might be with respect to performing miscellaneous errands for his neighbors, if within the knowledge of his employer, would not occur to him ordinarily as requiring exclusion. Being a custom of the bank it follows as a reasonable inference that the directing officers knew of it, and even if they did not expressly direct or acquiesce in the actions of their employes under it, nevertheless his activities in that respect were incidental to his recognized duties. Conceding that by taking the deposits Propst did not make the bank responsible to the depositors for the money before it reached its depository, it does not follow, in view of the surrounding facts and circumstances, that he was not acting in the course of his employment when he received such deposits. If at the time of the injury the deceased was doing what he expressly or impliedly was directed by his superiors to do—and we have held that he was—and the latter were vested with the authority to give him directions, then he was acting within the course of his employment. In *Comstock v. Bivens*, 78 Colo. 107, 239 Pac. 869, we said: "1 Honnold on Workmen's Compensation, section 114, says where an employe is doing something which, though not strictly in the line of his obligatory duty, is still doing something incidental to his work, and while doing the same is injured, the accident causing the injury may properly be held to arise out of and in the course of employment, and he will be entitled to compensation."

Plaintiffs in error further contend that if the gathering up and bringing of deposits to the bank was within the course of deceased's employment, that when he went to the post office to mail a letter, he stepped aside from the course of that employment. We cannot agree with this contention. On this matter the finding of the commission was: "The commission finds that the accidental shooting had nothing whatever to do with the fact that the decedent had stopped at the post office. Apparently he was in the act of putting away his gun, an act which was performed at the end of the journey, and which might as well have been performed in the front of the post office as well as in front of the bank building." We think this finding is supported by reasonable inferences drawn from the record.

The further contention is made that the accident did not arise out of the employment for the reason that the gun causing it had no connection with the employment. It is stipulated that the president of the bank knew of the gun being carried and made no objection to it. The permit obtained from the sheriff was in the following words: "This is to certify that I, Ray R. Powell, Sheriff of Logan County, Colorado, do hereby grant a permit to Leon B. Propst, who is engaged in the banking business at Sterling, Colorado, to carry a gun, in defense of his person and property." In Comstock v. Bivens, supra, we said: "An employe in selecting the means and adopting the method for doing his employer's work is allowed some latitude and in view of the testimony that carrying weapons was a general custom of mail carriers in this region and that acts of lawlessness had been committed in this vicinity and that the employers knew that Comstock was carrying a rifle on his trips and made no objection, we hold that it was a resonable precaution for Comstock to take this weapon with him on his route in carrying the mails." The case of *Industrial Commission v. Pueblo Auto Co.*, 71 Colo 494, concerned a claim for compensation by the widow of an automobile salesman. The latter, driving a car belonging to his employer, and while returning to town after making a sale, was attacked and killed by persons whose purpose was to obtain the car in which he was riding. In that case, in reversing the judgment of the district court vacating an award to claimant, we said: "That such travel is subject to the danger of assault for the purpose of robbery is not to be denied in view of the frequent reports of such assaults." We think that what was said in that case applies with equal effect to facts disclosed in the present proceeding. As stated in *Comstock v. Bivens, supra*, an employe has some latitude in determining the manner in which he will carry on his employer's work. We think that the commission was right in its statement that "one who is charged with conveying sums of money along the public highways cannot be said to be overzealous in his employer's service if he arms himself to protect those sums of money."

We find no error in the record and the judgment accordingly is affirmed.

MR. JUSTICE BURKE, Acting Chief Justice, and MR. JUSTICE HILLIARD, concur.

THE LINDNER PACKING AND PROVISION COMPANY et al. vs. INDUSTRIAL COMMISSION OF COLORADO, NORA JEANNE O'GRADY et al.

99 Colo. ....

I. C. 87651 60 P. (2nd) 924 Index No. 233

YOUNG, Justice.

This cause is here on writ of error to review the judgment of the district court sustaining an award of compensation to the dependents of Joseph M. O'Grady, herein referred to as the deceased, whose death was proximately caused by an accident arising out of and in the course of his employment. It is conceded by the employer and the insurer, who are the plaintiffs in error, that the dependents are entitled to compensation. The only issue involved is as to the amount to which they are entitled.

Deceased was 24 years of age at the time of his death and his dependents are a wife and infant child surviving. For eight months of the year immediately preceding the accident the deceased was registered as a student in and attended Regis College. During vacation periods he worked for his father. The commission found his wages earned by such employment to be the sum of $352.36. The question presented is whether the time spent in college, which the commission found to be 32-3/7 weeks shall be considered as time in which he was engaged in business for himself.

The pertinent part of the statute on computing the average weekly earnings is subparagraph (c) of Sec. 47 of the Workmen's Compensation Act (Sec. 4421, C. L. 1921, as amended by Session Laws of 1929, page 684, chapter 186) which is as follows: "Provided, however, that in any case where the injured employe has been ill, and unable to work in consequence of such illness, or has been in business for himself during the twelve (12) months immediately preceding the accident, his average weekly earnings shall be computed by dividing the total amount earned during such twelve (12) months by the sum representing the difference between fifty-two (52) and the number of weeks during which such employe was so ill or in business for himself."

The term "business" has been variously defined by lexicographers and courts. Webster's New International Dictionary defines business as "that which busies, or engages time, attention, or labor, as a principal serious concern or interest. Specif.: a. Constant employment; regular occupation; work; as, the business of life; business before pleasure. b. Any particular occupation or employment habitually engaged in, esp. for livelihood or gain. 'The business of instruction.' Prescott. c. A particular subject of labor or attention; a temporary or special occupation or concern."

6. Cyc. 259, defines "business" as follows: "That which occupies the time, attention and labor of men for the purpose of a livelihood or profit; * * * that which one does for a livelihood; * * * the employment or occupation in which a person is engaged to procure a living; any occupation or employment for a livelihood or gain; * * *"

1. Bovier's Law Dictionary, page 273, defines "Business" as "that which occupies the time and attention and labor of men for the purpose of a livelihood or profit."

Schneider on Workmen's Compensation Law, Vol. 1 (2d Ed.) Sec. 28, p. 235, says: "It would be a very exceptional person—we do not know how otherwise to describe him—who would not understand that reference (business) would be the habitual or regular occupation that the party was engaged in with a view to earning a livelihood or some gain. These objects are necessarily implied when one's business is spoken of. Eliminate livelihood and gain and it is no longer business, but amusement, which no one confounds with business."

In the case of *Buckler v. Guenther*, 96 N. W. 895, the following statement is found: "The term 'engaged in business' should be construed as signifying employment or occupation, which occupied the minor's time for the purpose of a livelihood or profit."

The court in *Hutchings v. Burnet*, (App. D. C.) 58 F. (2d) 514, used the following language: "Business is defined as that which occupies time and attention and labor of men for purpose of livelihood or profit, while carrying on business' does not mean the performance of single disconnected business act, but means conducting, prosecuting and continuing business by performing progressively all acts normally incident thereto, and 'doing business' is defined as conveying idea of business being done, not from time to time, but all the time."

In *LaCroix v. Frechette*, 145 A. 314, 50 R. I. 90, the court said: "Business as used in the Compensation Act of Rhode Island includes employers business activities carried on for gain or profit."

In *Morgan v. Salt Lake City*, 3 P. (2d) 510, the court said: "Business is a pursuit or occupation and denotes the employment or occupation in which a person is engaged to procure a living, being synonymous with calling, occupation or trade, and is defined as any occupation or employment habitually engaged in for livelihood or gain."

In *Deering v. Blair*, 23 F. (2d) 975, 57 App. D. C. 367, the court held: "That it is essential that livelihood or profit be at least one of the purposes for which employment is pursued."

In *Hughes v. Pallas*, 84 Colo. 14, 267 Pac. 608, this court said: "The contention of the plaintiff in error, that the clause 'and for no other business' is so all-exclusive that the three rummage sales of the churches in the restaurant constituted 'conducting business' within the terms of the lease, is not a construction to which we can give our assent. It is true that the word 'business' has a large significance, and has been defined to embrace everything about which a person can be employed. * * * 'Business' means constant employment,

or a regular occupation, and implies the idea of permanence. Down v. Comstock, 38 Ill. 445, 149 N. E. 507."

In Vol. 1, Words and Phrases, Second Edition, under the heading of business the following appears: "The term 'business' as used in a law imposing a license tax on business, trades, etc., ordinarily means business in the trade or commercial sense, only carried on with a view to profit or livelihood. Cuzner v. California Club, 100 P. 868, 871, 155 Cal. 303, 20 L. R. A. (N. S.) 1095." "The word 'business' in its broad sense embraces everything about which one can be employed, and in its narrower sense it signifies a calling for the purpose of livelihood or profit. Easterbrook v. Hebrew Ladies' Orphan Society, 82 Atl. 561, 563, 85 Conn. 289, 41 L. R. A. (N. S.) 615."

In Vol. 1, Words and Phrases, Third Series, under the heading "Business" it is said: "the word 'business' is commonly employed in connection with an occupation for livelihood or profit, but is not limited to such pursuits. Griffin v. Russell, 87 S. E. 10, 11, 144 Ga. 275; L. R. A. 1916F, 216 Ann. Cas. 1917D 995; Lacey v. Forehand, 108 S. E. 247, 248, 27 Ga. App. 344."

In Vol. 1, Words and Phrases, Fourth Series, under the heading of business the following definitions are given. "Business" has been defined to mean activity, energy, capacity, opportunities by which results are reached, and as embracing everything about which a person can be employed. Norman v. Southwestern R. Co., 157 S. E. 531, 533, 42 Ga. App. 812." "'Business' is that which busies or occupies the time, attention or labor of one as his principal concern, whether for a long or short time; occupation; any particular occupation or employment, mercantile transactions in general; concern; right or occasion of making one's self busy; affairs; transactions; business and employment being synonymous. Industrial Fibre Co. v. State, 166 N. E. 418, 419, 31 Ohio App. 347."

In the light of the various definitions of the term "business" given by lexicographers and courts, it will be observed that the question resolves itself to a determination of whether that term as used in section 4421, C. L. 1921, supra, implies an occupation of one's time in some activity with an objective of direct financial profit or livelihood accruing out of the activity, or whether it is used in the general sense of an occupation of one's time in some regular activity that may or may not have the objective of direct financial profit or livelihood. The foregoing judicial decisions clearly indicate the two conceptions that may attach to the term "business"—one that of any regular activity that occupies one's time and attention, with or without a direct profit objective—the other being such an activity with such a direct profit objective.

We have held in *Danielson v. Industrial Commission*, 96 Colo. 522, 44 P. (2d) 1011, that "the act (Workmen's Compensation Act) is highly remedial and beneficent in purpose, and should be liberally construed so as to accomplish its evident intent and purpose. Central Surety and Ins. Corp. v. Industrial Commission, 84 Colo. 481, 271 Pac. 617; Industrial Commission v. Johnson, 64 Colo. 461, 172 Pac. 422; Employers' Mutual Ins. Co. v. Industrial Commission, 65 Colo. 283, 176 Pac. 314."

It is necessary to have some practical means of determining earning capacity. The legislature fixed the period of one year immediately preceding the accident as a reasonable period and the industrial history of the employe during such period as a reasonable factual basis for ascertaining the proper amount of loss sustained by such employee, if injured, and by the dependents if death ensued as a result of an accident arising out of and in the course of his employment. If the employe has his services on the labor market for a year and is only employed for wages for six months his total yearly earnings are assumed to be what he in fact earned during the year. If by reason of sickness he is forced to withdraw his services from the labor market for a part of the year, or if he voluntarily withdraws them for a part of the year by engaging in business, the law assumes that had his services been on the labor market for an entire year he would have earned throughout the year at the same rate that he did earn while employed. Clearly deceased's services were not on the labor market while he was in school. Since his services were withdrawn from the labor market for a part of the year by reason of a definite and regular program that occupied his time, a program that the claimant adopted and made it his business to carry out, a program that under the record excluded the possibility of his services being on the labor market while it was being carried out, we think the deceased may reasonably be said to have been in business for himself, in the extensive sense of the term as defined both by the lexicographers and the courts.

Such a construction is in accord with the beneficent purposes that the act was designed to accomplish.

The judgment of the district court is affirmed.

MR. JUSTICE HILLIARD, Acting Chief Justice, and MR. JUSTICE BUTLER, concur.

THE BOARD OF COUNTY COMMISSIONERS et al. vs. W. F. EVANS.

99 Colo. ....

I. C. 84741 **60 P. (2nd) 225** **Index No. 234**

HILLIARD, Justice.

Hilliard, Justice.

A proceeding under the Workmen's Compensation Act. The claimant, Evans, resident of Eagle County, was summoned and served as a juror at a term of the fifth judicial district court held at said county, and alleged that in consequence of circumstances attending the service he was made sick and on return

to his home had a chill, which was followed by pneumonia. He claims that under Section 4383, C. L. 1921, as amended by chapter 175, page 818, Session Laws 1931, he was an employe of the county and entitled to compensation benefits. The award of the commission was adverse to claimant, but the trial court adjudged in his favor. The county, the commission, and the State Compensation Insurance Fund challenge the judgment, and contend: (1) That the juror was not a county employe within the meaning of the compensation act; (2) that while serving as a juror claimant's employment was casual and not in the course of the usual occupation of the county; (3) that the disease of pneumonia, the basis of claimant's demand, was not caused by accident arising out of and in the course of his employment. We dispose of the case on the first point.

It appears that claimant, 70 years of age, summoned for June 11, 1933, served actively as a juror in the trial of a criminal case June 12, 13 and 14; that after midnight of the 13th, agreement not having been reached in the case, which had been submitted, the jury was lodged in the county jail for the remainder of the night; that the sheriff supplied the jurors with small mattresses, but with no covering; that the next morning claimant suffered with a cold, which continued after his return home in the afternoon of that day (Thursday); that home remedies were administered and he appeared to be "resting easy"; that Sunday, following, a doctor was called who said "it looked like pneumonia," as eventuated; that the "crisis" came the next Tuesday or Wednesday night, after which claimant slowly improved for about two weeks; that after the pneumonia had seemingly run its course, claimant's lungs showed signs of congestion; that the doctor then advised that he be taken to the Oak Creek hospital, which was done July 7, 1933, where, his illness persisting, he continued for about four weeks; that for a couple of months after his discharge from the hospital claimant could not sit up all day; that never thereafter was he able to work as before.

In its formal award against claimant, the commission said: "The disease of pneumonia for which claimant claims compensation was not contracted as the result of an accidental injury within the meaning of the Workmen's Compensation Act. Further, that claimant was not an employe of the County of Eagle, within the meaning of the * * * act and that if an employe of said county, such employment was but casual and not [in] the usual course of trade, business, profession or occupation of said county." As applicable here, the statute—already cited—defines the term "employe" as follows: "(a) Every person in the service of the state, or of any county * * *, under any appointment or contract of hire, express or implied, except an elective official of the state, or any county, * * *."

We cannot think the status of a juror is that of an employe serving, to quote the statute, by "appointment or contract of hire, express or implied." Jurors are selected, summoned and serve, pursuant to statute. Secs. 5839-5849, C. L. 1921. Their compensation is fixed by like authority. Sec. 7905, C. L. 1921, as amended. S. L. '29, p. 425, c. 119. It is true that except in instances where jury fees are taxed to parties litigant, the county must discharge that burden; but neither the service of the juror nor the obligation of the county, as we conceive, comes of appointment or contract. The county does not negotiate with a citizen for his services as a juror, nor does the citizen apply to the county for such preferment. When a citizen is summoned to jury duty he responds to process running in the name of the people, which imports such dignity that it commands respect, and is of such force that none disobeys. By the majesty of the law, therefore, not by contract, he becomes a juror. Neither he nor the county is consulted as to whether, or when, he shall serve, or as to the duration of his service or the compensation therefor. A juror, it seems proper to say, has to do with the gravest affairs of men, and what he determines as to matters submitted to him is not subject to control from any source whatever. The legislative branch of the government has not said that a juror is an employe of the county, and it does not lie with the judicial branch to belittle the functions of his great office by so declaring. Indeed, we are not at liberty to extend the statutory provisions. *Colorado F. & I. Co. v. Industrial Com.*, 88 Colo. 573, 298 Pac. 955. Jury service, as has been said, "Is a temporary employment from which the person is relieved as soon as the duty is performed. The duty to serve as a juryman is an obligation to the community in which he resides, and his consent to serve is not essential. His position as a juryman is not the result of contract." *The Queen v. Lui Self*, 8 Hawaii 434. "A Juror * * * is neither appointed nor elected to his position of duty." People v. Hopt, 3 Utah 396, 4 Pac. 250. For extended discussion of general principles in varying instances, see *Mann v. City of Lynchburg*, 129 Va. 453, 106 S. E. 371; *Industrial Commission v. Shaner*, 127 O. St. 366, 188 N. E. 559; *Vaivida v. Grand Rapids*, 264 Mich. 204, 249 N. W. 826; *Los Angeles v. Industrial Commission*, 35 Cal. App. 31, 169 Pac. 260; *Board of Trustees v. Industrial Commission*, 149 Okla. 23, 299 Pac. 155; *Murray County v. Hood*, 163 Okla. 167, 21 P. (2d) 754. We have given attention to *Industrial Commission v. Rogers*, 122 O. St. 134, 171 N. E. 35, 70 A. L. R. 1244, 1248, cited by counsel for defendant in error. That is the only case of which we are advised where a juror has sought an award of compensation benefits, and *there* the juror prevailed. The learned court of that pronouncement is greatly to be respected, but we are not persuaded to its view of the office of a juror, or as to the genesis of his selection. In no conceivable sense, we think, is a juror engaged by or for the county by appointment, or contract of hire, or at all. The functions as part of the judicial machinery, and is as indispensable to its ongoing as is the judge of the court where he serves. The Ohio court observed that the question was "close," and

reviewing it subsequently, remarked in like manner. *Industrial Co. v. Shaner, supra.*

Let the judgment be reversed, the trial court to order in conformity with this opinion.

MR. CHIEF JUSTICE CAMPBELL, MR. JUSTICE BUTLER and MR. JUSTICE HOLLAND concur.

CAREY W. RHODES et al. vs. INDUSTRIAL COMMISSION OF COLORADO and MRS. MAYE HENDERSON.

99 Colo. ....

I. C. 85631 **.... P. (2nd) ....** **Index No. 235**

BURKE, Justice.

This is a Workmen's Compensation case. Plaintiffs in error are hereinafter referred to as the Trust and Rhodes, respectively, and the latter's wife as Mrs. Rhodes. Defendants in error are referred to as the Commission and Mrs. Henderson, respectively, and the latter's deceased husband as Henderson.

Henderson was killed by a rock slide while placer mining on property owned by the Trust, which carried no insurance. Mrs. Henderson filed her claim with the Commission, which found for her. The district court sustained the award and to review that judgment plaintiffs in error prosecute this writ. Their contentions here are: (1) The Trust is not a party; (2) one Hitchings, upon whose conduct as agent for the owners Mrs. Henderson relies, was not shown to be such agent; (3) no evidence brought plaintiffs in error within the provisions of section 4423, C. L. 1921, the statute here in question.

1. The Trust is a common-law trust, created in 1932 by Rhodes and Mrs. Rhodes. They were sole trustees and each had all the power of both. However, Rhodes was in fact the actual manager and handled the property as his own. His Chicago address and that of the Trust were the same. The Trust appeared by counsel in all proceedings above mentioned, and the claim that it is was not properly made a party is raised here for the first time. If otherwise good it comes too late.

People v. Drug Co., 10 Colo. App. 507; 51 Pac. 1010.

2. It is clear that, for present purposes, Rhodes is the Trust. It is said that Hitchings' agency was established by his own testimony, contrary to the rule that this can not be done by mere declarations of the alleged agent. But it was not. He testified to the facts from which the agency appeared. This is always permissible.

Wales v. Mower, 44 Colo. 146; 96 Pac. 971.

Under Rhodes' instructions Hitchings put up signs on the property, made agreements with many individuals and outfits to mine it, fixed the royalties payable, of which he received one-third for his services, generally supervised operating activities, and saw that operators complied with the law. Agency may be established by the conduct of the principal and the alleged agent.

Silver M. M. Co. v. Anderson, 51 Colo. 298, 117 Pac. 173. We think the agency clearly established.

3. If this judgment be affirmed it must be because plaintiffs in error were "conducting" the business of placer mining on the property in question within the terms of said section 4423 which, so far as applicable, reads:

> "Any person, company or corporation operating or engaged in or conducting any business by leasing, or contracting out any part or all of the work thereof to any lessee, sub-lessee, contractor or sub-contractor, shall * * * be construed to be and be an employer as defined in this act and shall be liable as provided in this act to pay compensation for injury or death resulting therefrom to said lessees, sub-lessees, contractors and sub-contractors and their employes, * * *."

We doubt not that by this section the General Assembly intended to cover such transactions as the one before us, although, as too often happens, that intent is somewhat obscured by the dust of superfluous language. If the Trust was conducting this business it was doing so by some sort of contract, and the relation of employer and employe existed simply because the lawmakers, havin full power to so define it for the purposes of the act, said so.

Industrial Comm. v. Continental Inv. Co., 78 Colo. 399, 242 Pac. 49.

Every form of lease and every variety of employment rests upon contract. The Trust says: First, Henderson was not its lessee; second, he was not its sub-contractor; third, he was not its employe. Some good reasons are presented to support each of these assertions, and Mrs. Henderson's case thus attacked piece-meal appears to be demolished. The weak point in this argument, however, is an erroneous assumption. The act is not limited to specific technical relationships. It covers every business conducted by one through the activities of another under any kind of contract.

Doubt is cast upon this conclusion by the application of our holding in Flick v. Industrial Comm. 78 Colo. 117; 239 Pac. 1022. But because of a diversity of facts that authority is not controlling. Flick was a farmer. He had no other business. He merely permitted one Ish to take gravel from his farm. It was alleged, and the Commission and the court found, that this was a lease. We held this conclusion unsupported by the evidence and reversed the judgment, saying: "Since the Commission has found merely a leasing, the other factors

mentioned in the statute as sufficient to charge an owner with the liabilities of an employer must be deemed to have been found in the negative." Here the finding was that the owners were "operating their property upon a system of leasing or contracting all the work thereon, and that they were employers of decedent within the meaning of section 49 (said section 4423) of the compensation act." Thus "the other facts mentioned in the statute" are not here "found in the negative," but in the affirmative, and if there is evidence to support any of them the judgment must stand.

The salient facts disclosed are: that the total extent of the Trust's placer tract (unused and useless for any other purpose) was approximately 2300 acres; it was extensively operated prior to 1921, then lay dormant until 1933, when over fifty men were put to work on it on sections specifically defined and assigned under contracts, written and oral, for fifteen to twenty per cent royalty to the Trust. During the years 1933 and 1934 from seventy to one hundred men were engaged in placer mining on the property under agreements similar to that granted Henderson and his associates. Lists of those so engaged were furnished by Hitchings to the bank at Fairplay and these, together with royalties paid, less Hitching's commissions, the bank transmitted to the Chicago office of the Trust. Early in 1934 written contracts were discontinued. About the middle of May of that year Henderson and his associates asked Hitchings for a tract one of them had previously worked but were told that it has been reassigned. Another tract, covering about ten acres, was agreed upon and its exact boundaries designated. The equipment to be used and the extent of operation were also detailed and agreed to. It was further stipulated that the work must be prosecuted diligently and as Hitchings directed or he might cancel the contract. The equipment was finally all installed, to Hitching's satisfaction, and work commenced and continued with diligence until Henderson's death.

We think these facts bring the case clearly within the terms of the act in question and support the conclusion of the District Court.

The judgment is accordingly affirmed.

MR. CHIEF JUSTICE CAMPBELL, MR. JUSTICE BUTLER and MR. JUSTICE HOLLAND dissent.

STATE COMPENSATION INSURANCE FUND et al. vs. JEWEL CLARK HARTMAN et al.

99 Colo. ....

I. C. 78765 **.... P. (2nd) ....** **Index No. 236**

HOLLAND, Justice.

The State Compensation Insurance Fund and Hartman Brothers, Inc., prosecute this writ of error to reverse a judgment of the District Court which affirmed an award of the Industrial Commission entered in favor of the claimant, Jewel Clark Hartman. Reference herein will be made to the State Compensation Insurance Fund as the insurer, Hartman Brothers, Inc., by name or as employer, and defendants in error as claimant and the Commission.

Hartman Brothers, Inc., conducted an automobile or garage business under that name at Montrose, Colorado. Sidney Carlton Hartman, deceased, a son of one of the proprietors, was an employe on July 11, 1933, working as a filling station attendant. While he was so engaged and on that date, an explosion occurred in the garage in which he received serious burns to the face, head, shoulders, knees and legs. For these injuries claim was made and temporary disability benefits paid. The disability continued for about 60 days, at the end of which period he returned to work and continued until about September 23, 1934. He was about 21 years old and single until the latter date, when he married the claimant herein, they going to Salt Lake City on a honeymoon trip, returning after about eight days. Deceased went to bed on the day of his return by reason of illness and died October 5 following. His widow filed a claim with the Commission as a dependent. Upon a hearing in due course, a referee of the Commission found that decedent's death was the proximate result of the accidental injury incurred July 11, 1933, but denied the claim for compensation on the ground that claimant was not a dependent of the decedent at the time of his accident, she having been married to him over a year thereafter. This ruling finally was reviewed by the Commission which affirmed the finding that decedent's death was the proximate result of his accidental injury, with the further finding that claimant was a dependent within the meaning of the Workmen's Compensation Act as construed in *McBride v. Industrial Commission*, 97 Colo. 166, 49 P. (2d) 386. Upon this finding, the Commission entered its award directing that compensation be paid to claimant at the rate of $40.66 per month beginning October 5, 1934, and continuing thereafter until the sum of $2,927.86 had been paid. This award of March 24, 1936, was made final by a subsequent award on April 3, 1936. Upon a complaint filed in the District Court April 22, 1936, the court, June 18, 1936, affirmed the award of the Industrial Commission.

After conceding that the finding that deceased died as a result of the accident of July 11, 1933, has such support in the evidence under the decisions of this court that it will not be disturbed, counsel for plaintiff in error does not raise that issue on this review, but vigorously insists that the finding that claimant is a dependent within the meaning of the Workmen's Compensation Act, is contrary to the provisions of the act, and that the decision of this court in *McBride v. Industrial Commission, supra*, construing a post-injury spouse to be a dependent, is wrong. This is the sole question now presented.

Upon this proposition, that of determination of dependents, the case at bar is identical with *McBride v. Industrial Commission, supra.* The conclusion in that case was reached after careful and deliberate consideration of the question by the court en banc and adhered to after elaborate and exhaustive briefs were presented by defendants in error and numerous friends of the court in support of a petition for rehearing. This being true and the sole issue before us having been fully and finally determined by the decision in the McBride case, we content ourselves by affirming the judgment of the trial court, on authority of the holding in that case.

Judgment affirmed.

MR. JUSTICE HILLIARD and MR. JUSTICE BOUCK dissent.

UNITED STATES FIDELITY & GUARANTY COMPANY et al. vs. INDUSTRIAL COMMISSION OF COLORADO and N. O. LIPE.

99 Colo. ....

I. C. 80330 .... P. (2nd) .... Index No. 237

BURKE, Justice.

Plaintiffs in error are hereinafter referred to as the Insurance Company and Vaughn, and defendants in error as the Commission and Lipe, respectively.

This is a workmen's compensation case. Vaughn was the employer, the Insurance Company carried his industrial insurance, and Lipe was his employe. Lipe was injured November 24, 1933, while engaged about the drilling of an oil well at Craig, Colorado. Such proceedings were regularly had as resulted in an award to him, by the Commission, of $14.00 per week for one year from December 5, 1933, for temporary disability, and 139 weeks thereafter, at the same rate, for permanent disability, and the affirmance of that award by the court. To review that judgment this writ is prosecuted.

The ten assignments of error may be thus briefly summarized: 1—The Commission was without jurisdiction and evidence to that effect was improperly rejected; 2—The question of jurisdiction was not waived by plaintiffs in error as held by the Commission; 3—There is no evidence to support the holding that temporary disability ended December 6, 1934.

1—Lipe's contract of employment was entered into in Texas and largely to be performed, and so performed there. He had worked for Vaughn outside of Colorado for more than ten years immediately prior to his employment here. His assignment in this state extended only to the drilling of one well. Vaughn took out insurance with the Insurance Company covering his Colorado operations, and unless excluded for reasons hereinafter discussed, the policy covered the accident in question, and Vaughn and Lipe had both brought themselves under the act. December 14, following the accident the Insurance Company, ignorant of the Texas contract and employment, admitted liability and paid thereunder at the rate of $7.69 per week to July 2, 1934, a total of $230.70. Later in that month Texas counsel for Lipe advised the Company that he had filed claim under the Texas act, elected to pursue his remedy there, and would hence accept no further compensation under the Colorado law. The Commission was so advised and approved the suspension of payments. Nine months thereafter Lipe advised the Commission that he had failed to establish his claim in Texas and it proceeded here.

Assuming first that the Commission originally had jurisdiction we address ourselves to the effect, if any, of the Texas action. It is contended that Lipe was thereby estopped; but since the record discloses no action by plaintiffs in error in reliance thereon, and no prejudice to them thereby, we find no estoppel. It is further suggested that the Texas decision was erroneous. It appears, however, that under the law of Texas, while Lipe might originally have made claim there he is barred if he has first proceeded in another state. Moreover, Texas has construed her own law and comity binds us. We therefore conclude that if the Commission originally had jurisdiction it was not lost. We do not here discuss authorities cited on election of remedies since certain rules applicable thereto are inapplicable to election of forum, where such election is allowed a litigant.

Did the Commission originally have jurisdiction? Defendants in error say their opponents conceded it by admission and payment and are bound thereby. But, aside from the effect of their justifiable ignorance of the place of the contract of employment at the time they acted, jurisdiction cannot be conferred by consent nor lack of jurisdiction waived. Plaintiffs in error assert no jurisdiction because the contract was made and to be principally performed outside of Colorado and they cite and rely upon Industrial Commission v. Aetna Life Ins. Co., 64 Colo. 480, 492; 174 Pac. 589; and Hall v. Industrial Commission, 77 Colo. 338; 235 Pac. 1073. Defendants in error distinguish the Hall case by the contention that there the employe was not insured under the Colorado act, hence not subject to it, and maintain that the Aetna case was overruled by Platt, Inc. v. Reynolds, 86 Colo. 397; 282 Pac. 264; and Home Ins. Co. v. Hepp, 91 Colo. 495; 15 Pac. (2d) 1082.

In the Aetna case employer and employe resided in Colorado and the contract of employment was made here. It contemplated some work elsewhere. The employe had completed a job in Wyoming and was killed in an accident in that state while en route to Idaho to engage in similar work. We held recovery could be had in Colorado because the law of the place of contract governed. In the Hall case the employer resided in Kansas and the contract was made

there or in Nebraska. We held recovery could not be had here because of the rule laid down in the Aetna case, but injected another element, i. e., where "the work is not to be carried on principally within the state where the accident occurs." In the Platt case the employer resided in Colorado and the employe in Nebraska. The contract was entered into in Colorado and the accident occurred in Nebraska. On the authority of Wandersee v. Moskewitz, 198 Wis. 345; 223 N. W. 837, holding that, while the employer resided and the contract was entered into in Wisconsin there could be no recovery in that state because the employe resided, the services were performed, and the injury occurred in Minnesota, we denied recovery, holding that, to constitute a person an employe under the provisions of the act he must render service in this state. The opinion makes no mention of the Aetna and Hall cases and apparently they were not cited in the briefs. However, a strict adherence to the rule upon which those decisions were predicated would have required a contrary disposition. The Platt case was decided en banc, one of the Justices not participating. The Hepp case was decided en banc with all participating. There the contract was entered into in Colorado but the employe resided in New Mexico where "the major portion of his services were performed" and where he was killed. However, the employe, under his contract, was required to work in Colorado if so directed, and had so worked. The Commission held against him but was reversed by the District Court in a judgment which we affirmed. Claimant relied upon the Aetna case and the employer and his insurer upon the Platt case; also upon Tripp v. Industrial Commission, 89 Colo. 512; 4 Pac. (2d) 917. In the latter the claimant was employed in Colorado by the agent of a Nevada corporation. The services were performed entirely without this state and the accident occurred in Kansas. The Commission, the District Court, and this court held no jurisdiction. In the Hepp case we pointed out that the law of the place of the contract "as the sole criterion of construction" had been clearly repudiated in the Platt case and that repudiation reaffirmed in the Tripp case. We further said:

> "In every instance where the contract was made and a substantial portion of the services thereunder were to be, and were, performed in this state, recovery under the act has been upheld. We have no doubt of the soundness of this rule. We find no occasion in the instant case to go beyond it and must decline here to express any opinion upon any other combination of facts."

The statement is correct, and in view of the fact that the contract then before us was entered into in Colorado, nothing further was required.

It thus appears that to justify recovery under our law the one essential element is that a substantial portion of the work must be done in this state, but that with this must be combined either an accident in Colorado or a contract in Colorado. Here we have an accident in Colorado to one working under a contract a substantial portion of which was to be performed in Colorado. Add to this the facts that employer and employe otherwise came within the terms of the Colorado act and the accident was covered by insurance carried, and we doubt not that the spirit and intent of workmen's compensation legislation require us to hold that the Commission here had jurisdiction.

DeGray v. Miller Bros. Const. Co., Inc., 106 Vt. 259; 173 Atl. 556.

2—What we have above said disposes of this point.

3—This is simply a question of evidence. The witness Dr. Packard gave it as his opinion that the period of total temporary disability as distinguished from permanent disability "would be somewhere between six and twelve months from the time of the injury." We think this, and other matters unnecessary to recite, justified the conclusion of the Commission.

The judgment is affirmed.

NATIONAL LUMBER & CREOSOTING CO. et al. vs. JOSEPH A. KELLY et al.

Colo.

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HOLLAND, Justice.

This is a Workmen's Compensation case, in which Joseph A. Kelly, while in the course of his employment October 10, 1928, was injured by the runaway of a team of horses, the injuries consisting of a skull fracture and minor bruises. This accident occurred at Pagosa Springs, Colorado. Since this review is directed to the sufficiency in form of a final award dated February 25, 1936, it is unnecessary to detail the history of the claim up to that point, other than to say that Kelly brought suit for malpractice against his own physician who first treated him; that thereafter he employed numerous lawyers and physicians, undergoing physical examinations by the latter as well as by physicians selected by his employer and its insurance carrier. Neither the assignments of error nor the final award require a review of the evidence for a determination of the question as to whether such evidence is sufficient to support the award, and this discussion will be confined to the question of the sufficiency of its form, the substance of the errors assigned being to the effect that the award as made contains no specific findings or reasons constituting a proper basis for its rendition. Plaintiffs in error petitioned the commission for a rehearing in apt time after the entry of the award. Then followed the usual course of review by the district court, which affirmed the award of the Commission, and this writ of error is prosecuted to reverse the judgment entered thereon.

January 19, 1931, the Commission made a supplemental award, the pertinent part of which is as follows: "* * * claimant's temporary disability terminated November 1, 1930. His age is 51 years; his expectancy 20.2 years. He is permanently disabled to the extent of 25% as a working unit. * * *"

Eliminating a long history leading up to and following this supplemental award, it is sufficient to say that upon request of claimant, made by a new attorney and to a changed membership of the Commission, the latter, after a hearing and on February 25, 1936, made the supplemental award of which complaint is here made, the pertinent part being as follows: "* * * The commission now finds that its order of January 19, 1931, was erroneous in that claimant *was* and now is permanently and totally disabled. * * *" Thereupon it was ordered "that respondents resume the payment of compensation to the * * * claimant at the rate of $47.54 per month and continue * * * so long as claimant shall live or until further order of this commission." At the hearings preceding this supplemental award, the claimant on cross-examination testified that his condition was about the same as it was in December, 1930. The medical testimony at these hearings on the question of whether claimant's condition was worse or had improved is in conflict. Much of it was given without disclosing any knowledge of the intervening treatments and conduct of the claimant or his attitude toward treatments. The award of the Commission which followed, since it changed and increased the former award, should have contained specific findings, based upon the testimony, as to a changed condition, if such was found as well as specified findings as to error in the former findings. Because the award does not contain such specific findings, it is attacked for insufficiency, the attack being based upon numerous decisions of this court which have clearly stated that it is the duty of the Commission to make sufficiently detailed findings of fact so that the courts may determine whether the order or award is supported by the facts. *North Park Coal Co. v. Industrial Com.*, 90 Colo. 500, 10 P. (2d) 326; *Hayden Bros. Coal Corp. v. Industrial Com.*, 90 Colo. 503, 10 P. (2d) 325; *Duras v. Industrial Com.*, 90 Colo. 565, 11 P. (2d) 213; *Sherratt v. Rocky Mountain Fuel Co.*, 94 Colo. 269, 30 P. (2d) 270, and *Rocky Mountain Fuel Co. v. Sherratt*, 96 Colo. 463, 45 P. (2d) 643, in which this court said: "Reasons for findings are mandatory." The latter case further amplifies this requirement in the following language: "That statement applies to errors as well as changed conditions, and to it we now add that mere 'change of mind' with no statement of sufficient reasons therefor, is no compliance with the law."

Without receiving any testimony concerning claimant's condition prior to and leading up to the award of January 19, 1931, the Commission found merely that the prior award was erroneous and that claimant *was* and now is permanently and totally disabled. We have no way of knowing what was taken into consideration by the Commission in arriving at this finding. If it be said that the award is based upon a changed condition, then, as we have stated on a former occasion, courts should not be left paralyzed by being confronted with a finding of the Commission without a statement of the changed conditions inducing the final holding. It is the function and province of courts, on review, to determine whether the findings are supported by the evidence. In this case, after a careful examination of the entire record, we are not prepared to say that the evidence supports the finding of which complaint is here made, and therefore, it is with less reluctance that we hold that the award as made is insufficient and does not comply with the law. There being no evidence whatever concerning error in the prior award, or any finding pointing out the possibility of such error, it is apparent that plaintiffs in error, affected by an increased award, had no way of anticipating it; that they were surprised thereby and were entitled to the rehearing for which they petitioned in due time. We are at a loss to understand why the Commission, faced with the unchanging positive proncuncement of this court that reasons for findings of the Commission are mandatory, so frequently closes its deliberations with awards which, upon their face, the Commission itself upon due consideration would not justify, much less the courts.

The judgment is reversed and the cause remanded to the district court with directions that it send the case back to the Commission, instructing it to reopen the case and receive such competent testimony as may be offered upon which it shall make such award, if any, as it may feel the evidence warrants, and to be so specified in the finding and award.

MR. JUSTICE BURKE, sitting for MR. CHIEF JUSTICE CAMPBELL, and MR. JUSTICE HILLIARD concur.

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and

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